No.

In the Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

This dispute concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA). In 2016, this Court affirmed, by an equally divided Court, a decision of the Fifth Circuit holding that two related Department of Homeland Security (DHS) policies for exercising DHS's enforcement discretion under federal immigration law, including an expansion of the DACA policy, were likely unlawful and should be enjoined. See *United States* v. *Texas*, 136 S. Ct. 2271 (per curiam). In September 2017, the Acting Secretary of Homeland Security decided to wind down the DACA policy.

Respondents filed suit challenging that policy determination. Without considering serious issues concerning the district court's jurisdiction and the reviewability of DHS's decision, the court authorized immediate discovery and ordered a sweeping expansion of the administrative record to encompass deliberative and other privileged materials, including White House documents covered by executive privilege. Over a dissent by Judge Watford, the Ninth Circuit denied mandamus relief. The question presented is:

Whether, in an action challenging a federal agency's discretionary enforcement policy, a district court may order broad discovery and expansion of the administrative record beyond that presented by the agency, including through the compelled addition and public disclosure of deliberative, pre-decisional documents and other privileged materials.

PARTIES TO THE PROCEEDING

Petitioners (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States of America; Donald J. Trump, President of the United States; the United States Department of Homeland Security; Elaine C. Duke, Acting Secretary of Homeland Security; and Jefferson B. Sessions III, Attorney General of the United States.

Respondent in this Court is the United States District Court for the Northern District of California. Respondents also include the Regents of the University of California; Janet Napolitano, President of the University of California; the State of California; the State of Maine; the State of Maryland; the State of Minnesota; the City of San Jose; Dulce Garcia; Miriam Gonzalez Avila; Saul Jimenez Suarez; Viridiana Chabolla Mendoza; Norma Ramirez; Jirayut Latthivongskorn; the County of Santa Clara; and Service Employees International Union Local 521 (collectively plaintiffs in district court, and real parties in interest in the court of appeals).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 17
A. The government has no other adequate means to attain relief 18
B. The district court clearly and indisputably erred by ordering that deliberative and other materials be added to the administrative record, authorizing broad discovery, and summarily overruling the government's assertions of privilege 18
1. The district court clearly and indisputably erred by ordering expansion of the administrative record and authorizing intrusive discovery 19
2. The district court clearly and indisputably erred by ordering expansion of the administrative record to include deliberative materials 27
3. The district court clearly and indisputably erred by summarily dismissing the government's assertions of privilege 31
C. Mandamus relief is appropriate under the circumstances 32
Conclusion 34
Appendix A — Court of appeals order denying a petition for mandamus (Nov. 16, 2017) 1a
Appendix B — District court case management order for all DACA actions in this district (Sept. 22, 2017) 21a
Appendix C — District court order re motion to complete administrative record (Oct. 17, 2012) 26a

Table of Contents—Continued: Page

Appendix D — District court one-month continuance of due date for augmented administrative record and temporary stay of discovery (Nov. 20, 2017) 45a

Appendix E — Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) 47a

Appendix F — Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) 52a

Appendix G — Memorandum on Rescission of Deferred Action for Childhood Arrivals (Sept. 5, 2017) 61a

Appendix H — Statutory provisions 70a

TABLE OF AUTHORITIES

Cases:

Arizona v. *United States*, 567 U.S. 387 (2012) 2

Batalla Vidal v. *Duke*, No. 16-cv-4756, 2017 WL 4737280 (E.D.N.Y. Oct. 19, 2017) 11

Camp v. *Pitts*, 411 U.S. 138 (1973) 20

Checkosky v. *SEC*, 23 F.3d 452 (D.C. Cir. 1994) 27, 28

Cheney v. *United States Dist. Court*, 542 U.S. 367 (2004) ..... *passim*

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 20, 27, 30

Cases—Continued: Page

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985) 20, 24, 30, 33
Heckler v. *Chaney*, 470 U.S. 821 (1985) 2, 21
Hollingsworth v. *Perry*, 558 U.S. 183 (2010) 17, 18
Kansas State Network, Inc. v. *FCC*, 720 F.2d 185 (D.C. Cir. 1983) 28
Morgan v. *United States*, 304 U.S. 1 (1938) 27, 31
Mohawk Indus., Inc. v. *Carpenter*, 558 U.S. 100 (2009) 33
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 2, 3, 21, 23
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 33
San Luis Obispo Mothers for Peace v. *United States Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986) 14, 27
Subpoena Duces Tecum Served on Office of Comptroller of Currency, In re, 156 F.3d 1279 (D.C. Cir. 1998) 28
Texas v. *United States*:
86 F. Supp. 3d 591 (S.D. Tex.), 809 F.3d 134 (5th Cir. 2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016) 4
809 F.3d 134 (5th Cir. 2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016) 4
United States v. *Armstrong*, 517 U.S. 456 (1996) 23
United States v. *Morgan*, 313 U.S. 409 (1941) 27, 31
United States v. *Nixon*, 418 U.S. 683 (1974) 22, 32
United States v. *Texas*, 136 S. Ct. 2271 (2016) 4
Vermont Yankee Nuclear Power Corp. v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) 25, 29

Statutes: Page

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 4
5 U.S.C. 556(e) 28
5 U.S.C. 701(a)(2) 21, 70a
5 U.S.C. 706(2)(B) 23, 71a
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1103(a)(1) 2
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1182(a) (2012 & Supp. IV 2016) 2
8 U.S.C. 1227(a) 2
8 U.S.C. 1229b 2
8 U.S.C. 1252(g) 21, 86a
Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* 5

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PETITION FOR A WRIT OF MANDAMUS

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of mandamus to the United States District Court for the Northern District of California. In the alternative, the Solicitor General respectfully requests that the Court treat this petition as a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is not yet reported in the Federal Reporter, but is available at 2017 WL 5505730. An order of the district court (App., *infra*, 26a-44a) is not published in the Federal Supplement, but is available at 2017 WL 4642324. Two additional orders of the district court (App., *infra*, 21a-25a, 45a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1651 or, in the alternative, 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted at App., *infra*, 70a-86a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, charges the Secretary of Homeland Security "with the administration and enforcement" of the Act. 8 U.S.C. 1103(a)(1). Individual aliens are subject to removal if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012); see 8 U.S.C. 1182(a) (2012 & Supp. IV 2016); see also 8 U.S.C. 1227(a). As a practical matter, however, the federal government cannot remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396.

For any individual alien subject to removal, Department of Homeland Security (DHS) officials must first "decide whether it makes sense to pursue removal at all." *Arizona*, 567 U.S. at 396. After removal proceedings begin, officials may decide to grant discretionary relief, such as asylum or cancellation of removal. See 8 U.S.C. 1158(b)(1)(A), 1229b. And, "[a]t each stage" of the process, "the Executive has discretion to abandon the endeavor." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). Like other agencies exercising enforcement discretion, in making these decisions, DHS must engage in "a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985).

2. a. In 2012, DHS announced the policy known as Deferred Action for Childhood Arrivals, or DACA. See App., *infra*, 47a-51a. "Deferred action" is a practice in which the Secretary exercises discretion, "for humanitarian reasons or simply for [her] own convenience," to notify an alien of her decision to forbear from seeking his removal for a designated period. *AADC*, 525 U.S. at 484. A grant of deferred action does not confer lawful immigration status or provide any defense to removal. DHS retains discretion to revoke deferred action unilaterally, and the alien remains removable at any time.

DACA made available deferred action to "certain young people who were brought to this country as children." App., *infra*, 47a. Under the original DACA policy, following successful completion of a background check and other review, an alien would receive deferred action for a period of two years, subject to renewal. *Id.* at 50a-51a. The DACA policy made clear that it "confer[red] no substantive right, immigration status or pathway to citizenship," stating that "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* at 51a. DHS later expanded DACA (by extending the deferred-action period from two to three years and loosening the age and residency guidelines), and also created a new, similar policy referred to as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which made deferred action available for certain individuals who had a child who was a U.S. citizen or lawful permanent resident. See *id.* at 52a-60a.

In 2014, Texas and 25 other States brought suit in the Southern District of Texas to enjoin DAPA and the expansion of DACA. The district court issued a nation-

wide preliminary injunction, finding a likelihood of success on claims that DAPA and expanded DACA violated the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* *Texas* v. *United States*, 86 F. Supp. 3d 591, 607, 647, 665-678 (2015). The Fifth Circuit affirmed, holding that those policies likely violated both the APA and the INA. *Texas* v. *United States*, 809 F.3d 134, 146 (2015). This Court affirmed that judgment by an equally divided Court, *United States* v. *Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam), leaving in place the nationwide injunction against DAPA and the expansion of DACA.

b. In June 2017, Texas and other plaintiff States in the *Texas* case announced their intention to amend their complaint to challenge DACA in its entirety. App., *infra*, 66a. On September 5, 2017, rather than engage in litigation in which DACA would be challenged on essentially the same grounds that succeeded in *Texas*, DHS decided to wind down the remaining DACA policy in an orderly fashion. See *id.* at 61a-69a (Rescission Memo).

In the Rescission Memo, the Acting Secretary explained that, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation," as well as advice from the Attorney General that the original DACA policy was unlawful and that the "potentially imminent" challenge to DACA would "likely * * * yield similar results" to the *Texas* litigation, "it is clear that the June 15, 2012 DACA program should be terminated." App., *infra*, 66a-67a. In light of the "complexities associated with winding down the program," however, the Rescission Memo stated that DHS would "provide a limited window in which it w[ould] adjudicate certain requests for DACA." *Id.* at 67a. Specifically, it explained that DHS would "adjudicate—on an

individual, case by case basis—properly filed pending DACA renewal requests * * * from current beneficiaries that have been accepted by the Department as of [September 5, 2017], * * * from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017." *Id.* at 67a-68a. It further provided that the government "[w]ill not terminate the grants of previously issued deferred action * * * solely based on the directives in this memorandum" for the remaining portion of an alien's two-year period, which could last until March 2020 for some recipients. *Id.* at 68a.

c. Shortly after the Acting Secretary's decision, respondents brought these five related suits in the Northern District of California challenging the rescission of DACA. App., *infra*, 27a-28a. Collectively, they allege that the termination of DACA is unlawful because it violates the APA's requirement for notice-and-comment rulemaking; is arbitrary and capricious; violates the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*; denies respondents due process and equal protection; and violates principles of equitable estoppel. Similar challenges have also been brought in district courts in New York, Maryland, and the District of Columbia.

The merits of respondents' challenges to the Rescission Memo are not presented here, because the district court has not yet considered the government's pending motion to dismiss on jurisdictional and justiciability grounds as well as for failure to state a claim. This petition is addressed instead to that court's extraordinary departure from bedrock principles governing judicial review of federal agency action. Before even considering the government's motion to dismiss, the district

court has ordered sweeping additions to the administrative record to include deliberative materials and allowed broad discovery into the subjective motivations of the Acting Secretary and those who advised her, including White House officials.

3. a. On September 21, 2017, the district court held an initial status conference to discuss a litigation schedule. 9/21/17 Tr. 7.[1] The government explained that the cases were likely subject to dismissal on threshold grounds, and accordingly proposed dispositive briefing as the first step. *Id.* at 23. The government explained that, at a minimum, no discovery would be appropriate prior to filing the administrative record and the court's ruling on the government's threshold dispositive motion. *Id.* at 23, 34-35; see *id.* at 22 (explaining that "discovery at this point would be premature and unnecessary and really inappropriate").

The district court rejected the government's position, stating that respondents' proposal to take immediate discovery was an "excellent idea." 9/21/17 Tr. 20; see also *id.* at 22-23. The court entered a scheduling order that authorized immediate expedited discovery, including depositions, document requests, interrogatories, and requests for admission. App., *infra*, 22a. The order directed the government to produce an administrative record by October 6, 2017. *Ibid.* And it set a deadline of November 1 for "[m]otions for summary judgment, provisional relief, or to dismiss," *id.* at 23a, with a hearing on those motions scheduled for December 20, *id.* at 25a.

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[1] Citations are to the district court docket in *Regents of the University of California* v. *United States Department of Homeland Security*, No. 17-cv-5211.

The government filed the administrative record on October 6, 2017, consisting of all non-deliberative materials compiled and considered by the Acting Secretary in reaching her decision to rescind the DACA policy. D. Ct. Doc. 64. Respondents promptly filed a motion to "complete" the administrative record, demanding the production of "[a]ll documents and communications circulated within DHS or DOJ" concerning DACA; "[a]ll documents and communications between DHS or DOJ and * * * the White House" concerning DACA; "[a]ll notices, minutes, agendas, list[s] of attendees, [and] notes" from meetings held about DACA; "[a]ll documents and communications evaluating the costs and benefits" of rescinding DACA; and "[a]ll documents and communications discussing policy alternatives to rescinding DACA." D. Ct. Doc. 65, at 1, 9-10 (Oct. 9, 2017) (footnote omitted). Respondents also demanded that the government "produce the withheld [*i.e.*, privileged] documents, or at a minimum, * * * immediately produce a privilege log." *Id.* at 16.

b. On October 10, 2017, the district court entered an order directing the government to file a "privilege log" by October 12, and to appear at an in-person hearing on October 16, with "hard copies of all emails, internal memoranda, and communications with the Justice Department on the subject of rescinding DACA." D. Ct. Doc. 67, at 1. The government interpreted the order to require the production of a privilege log for only those documents that were actually considered by the Acting Secretary and bringing those documents to the hearing. See D. Ct. Doc. 71, at 3-4 (Oct. 12, 2017). The government filed a privilege log listing the documents from the Acting Secretary's files and briefly identifying the bases for privilege, see D. Ct. Doc. 71-2 (Oct. 12, 2017), and

submitted copies of these documents for *in camera* review.

At the October 16 hearing, the district court clarified that, in fact, it had expected the government to have arrived at the hearing with "[a]nything in the world that the agency has on the subject of rescinding DACA, whether it was with the Justice Department or not." 10/16/17 Tr. 10. The government explained that it had not interpreted the court's order in that manner and that complying with such an order "would have been impossible" due to the "enormous" volume of materials involved. *Id.* at 12.

c. Following the hearing, the district court granted in substantial part respondents' motion to "complete" the administrative record. See App., *infra*, 26a-44a. The court reasoned that "[t]he administrative record 'is not necessarily those documents that the agency has compiled and submitted as the administrative record.'" *Id.* at 29a (citation omitted). Rather, the court continued, regardless of the reasons offered by an agency for its decision or the record an agency compiles to support its reasoning, the "administrative record" for judicial review under the APA "'consists of all documents and materials directly or indirectly considered by agency decision-makers,'" *ibid.* (citation and emphasis omitted), including any documents "reviewed by subordinates, or other agencies who informed [the decision-maker] on the issues underlying the decision * * * either verbally or in writing," *id.* at 31a. And it reasoned that, even in the absence of any evidence of bad faith by the agency, a court could compel the production of all such documents if the plaintiffs could show, by clear evidence, that any had been omitted from the record compiled and presented by the agency. *Ibid.*

The district court further concluded that respondents had provided such evidence on the basis of four observations about the existing record. First, although the record included advice from the Attorney General on the legality of DACA, it did not contain any documents "supporting (or contradicting) the opinions set forth" in his letter, such as "the legal research that led to th[e] [Attorney General's] conclusion." App., *infra*, 33a, 38a. Second, although the government "concede[d]" that the Acting Secretary "received advice from other members of the executive branch" and had listed a "White House memorandum" in its privilege log, the existing record did not contain any nonpublic communications from "White House officials or staff." *Id.* at 34a (citations omitted). Third, the record did not contain any documents from the Acting Secretary's subordinates providing their "input" on the Acting Secretary's decision. *Ibid.* Fourth, the record did not include any "materials explaining the [agency's] change in position" on the continuation of the DACA policy, "with two exceptions": (1) the letter from the Texas Attorney General threatening to amend the complaint in the *Texas* suit to challenge the original DACA policy, and (2) the Attorney General's letter expressing his view that the original DACA policy was unlawful and would likely be enjoined. *Id.* at 35a. This, the court concluded, was clear evidence that the government had excluded relevant materials from the administrative record. *Ibid.*

The district court further determined that, because the Acting Secretary had pointed to concerns about DACA's legality in rescinding the policy, the government had categorically "waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power."

App., *infra*, 39a. And the court ruled—without briefing or individual discussion of any document—that 35 of the documents submitted for *in camera* review must be filed on the public docket. *Id.* at 43a. It did not dispute that those documents were covered by the deliberative-process privilege, but held that the privilege was overridden by an unspecified "need for materials" and for "accurate fact-finding" in the litigation. *Id.* at 40a. Moreover, although several of those documents are White House documents subject to a claim of executive privilege, the court announced in a footnote, again without briefing, that "[none] of these documents fall[s] within the executive privilege." *Id.* at 40a n.7.

On these bases, the district court ordered the government to "complete the administrative record" with "all emails, letters, memoranda, notes, media items, opinions and other materials directly or indirectly considered in the final agency decision to rescind DACA," including "(1) all materials actually seen or considered, however briefly, by Acting Secretary Duke in connection with" the challenged decision (except for those documents on the original privilege log that the judge had not ordered released); "(2) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with *written* advice or input regarding the actual or potential rescission of DACA"; "(3) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with *verbal* input regarding the actual or potential rescission of DACA"; "(4) all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of

DACA and their responses"; and "(5) all materials directly or indirectly considered by former Secretary of DHS John Kelly leading to his February 2017 memorandum not to rescind DACA." App., *infra*, 42a-43a (emphases added).

The district court further directed that, if the government "redacts or withholds any" of these materials as privileged, it must submit another privilege log and "simultaneously lodge full copies of all such materials," so that the court could "review and rule on each item." App., *infra*, 43a. The court's order also specified that it "[wa]s not intended to limit the scope of discovery" sought by respondents. *Id.* at 44a.

d. In the meantime, respondents served numerous discovery requests upon the government, including requests for production, interrogatories, requests for admission, and deposition notices. In an effort to comply with the district court's accelerated discovery deadlines, as well as similarly accelerated deadlines in cases challenging the rescission of DACA in the Eastern District of New York,[2] DHS undertook a dramatic reassignment of attorney, staff, and technology resources. At DHS headquarters, all full-time litigation staff were "assigned to review documents in the various DACA cases," and additional attorneys in other legal practice

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[2] The district court in those cases issued a similar series of orders authorizing immediate discovery and directing expansion of the administrative record. See *Batalla Vidal* v. *Duke*, No. 16-cv-4756, 2017 WL 4737280 (E.D.N.Y. Oct. 19, 2017). When the government filed a petition for a writ of mandamus, the Second Circuit stayed those orders pending adjudication of the petition. See Order at 1, *In re Duke*, No. 17-3345 (Oct. 24, 2017). That stay remains in place.

areas were diverted to document review. Stay Addendum (Stay Add.) 9-10. At Customs and Border Protection, information-technology staff were required to suspend "all of [their] work for other cases and court deadlines" in order to "expend the entire resource of E-Discovery's computer server" on respondents' discovery requests. *Id.* at 6. At Citizenship and Immigration Services, numerous attorneys were reassigned to discovery in the DACA litigation, and information-technology staff "made responding to [these] discovery requests" their "exclusive focus," postponing work on agency investigations as a result. *Id.* at 12. And at Immigration and Customs Enforcement (ICE), "[one] out of every 14 attorneys in ICE's legal offices across the country" were "pulled * * * from immigration court appearance responsibilities and other regular duties" to handle discovery in the DACA lawsuits. *Id.* at 16. Those efforts were "completely unprecedented" in the history of the agency. *Ibid.*

Respondents also noticed numerous depositions, including of high-level government officials and senior advisors. To date, respondents have deposed six government officials and have noticed the depositions of various others, including the Acting Secretary of Homeland Security herself. On October 24, 2017, the magistrate judge overruled the government's objections to the noticed deposition of the Acting Secretary. D. Ct. Doc. 94, at 1. And, although the government has not yet appealed that decision to the district court due to intervening stays of discovery, the court has already made clear its view. See 10/16/17 Tr. 35 ("[M]y own view is I would order that deposition pronto.").

e. In response to these extraordinary rulings and intrusions on the workings of the Executive Branch, the

government indicated its intent to seek mandamus relief from the court of appeals, and moved the district court to stay all discovery and expansion of the administrative record pending the resolution of that request. See D. Ct. Doc. 81 (Oct. 18, 2017). The district court denied the motion. See D. Ct. Doc. 85 (Oct. 19, 2017).

4. On October 20, 2017, the government filed its mandamus petition in the court of appeals, together with an emergency request for a stay, explaining that "[t]he district court's conduct in this case depart[ed] from settled principles of judicial review of agency action." Gov't C.A. Mandamus Pet. 2. The government requested that the court of appeals issue a writ of mandamus to "stay the district court's order to expand the administrative record to include sensitive privileged materials—including documents from the White House—and to stay ongoing discovery, including the depositions of high-ranking government officials." *Id.* at 1.

a. The court of appeals initially granted the government's emergency stay request. See 10/24/17 C.A. Order. But, on November 16, 2017, after expedited briefing and argument, a divided panel denied the government's petition and lifted its prior stay. App., *infra*, 1a-15a.

The panel majority (Judges Wardlaw and Gould) concluded that the district court had not "clearly erred" in reasoning that "DHS failed to comply with its obligation under the APA to provide a complete administrative record to the court." App., *infra*, 3a. Echoing the district court's reasoning, the court of appeals concluded that a "complete" administrative record includes not just the documents that the agency has compiled and that "form the basis for [its] ultimate decision," but "all materials that might have influenced the agency's decision." *Id.* at 8a (citations and internal quotation

marks omitted). Like the district court, it found significant the absence of legal research supporting the Attorney General's legal opinion, materials from the White House, and analysis from the Acting Secretary's subordinates. *Id.* at 7a-8a. On that basis, the panel majority reasoned that the district court could order production of "all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even [if] the final decision-maker did not actually review or know about the documents and materials." *Id.* at 10a (citation and emphasis omitted).

In response to the government's argument that the materials at issue were deliberative and properly form no part of the administrative record, the panel majority concluded that the district court's contrary ruling was not clearly erroneous because the Ninth Circuit had not previously addressed that question. App., *infra*, 14a. And it distinguished contrary D.C. Circuit precedent on the ground that that decision concerned deliberations among the members of a multi-member agency board rather than within a single Cabinet agency. *Id.* at 14a-15a (citing *San Luis Obispo Mothers for Peace* v. *United States Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986)).

Finally, the panel majority discounted "the separation-of-powers concerns raised by the government." App., *infra*, 3a. The majority rejected the government's argument, based on *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), that "requiring White House officials to search for and assert privilege as to individual documents would be an unwarranted intrusion into executive decision-making." App., *infra*, 12a. It noted that *Cheney* involved civil discovery rather than the

compilation of an administrative record. *Ibid.* The majority suggested that *Cheney* was also inapposite because "there is no indication that either [the President's] documents or those of the Vice President would fall within the completed administrative record as ordered by the district court." *Id.* at 13a.

b. Judge Watford dissented. App., *infra*, 16a-20a. In his view, the district court's order "constitute[d] 'a clear abuse of discretion,'" *id.* at 16a (citation omitted), and presented a "classic case in which mandamus relief is warranted," *id.* at 20a. Judge Watford observed that the district court's order "violate[d] two well-settled principles governing judicial review of agency action under the [APA]." *Id.* at 16a. First, "a court ordinarily conducts its review 'based on the record the agency presents to the reviewing court.'" *Ibid.* (citation omitted). Second, "documents reflecting an agency's internal deliberative processes are ordinarily not part of the administrative record," because "[t]he court's function is to assess the lawfulness of the agency's action based on the reasons offered by the agency." *Id.* at 17a.

Judge Watford noted that the district court's order "sweeps far beyond" the normal scope of APA review, extending even to "comments and questions propounded by Acting Secretary Duke to advisors" and other materials indisputably "deliberative in character." App., *infra*, 19a-20a. He emphasized that respondents had not made any showing of "'bad faith or improper behavior' on the part of agency decision-makers" to justify a departure from those well-established principles. *Id.* at 18a (citation omitted). And he reasoned that "the burden imposed by the [district court's] order is exceptional enough to warrant the extraordinary remedy of mandamus." *Id.* at 16a.

5. a. Hours after dissolution of the stay, the district court ordered the government to file the "complete administrative record" within six days, by noon on Wednesday, November 22, 2017. D. Ct. Doc. 188, at 1 (Nov. 16, 2017). Expressing its intention to seek emergency relief from this Court, the government filed in both the court of appeals and the district court motions for a stay pending this Court's resolution of the government's forthcoming petition. 11/17/17 C.A. Mot. to Stay; D. Ct. Doc. 191 (Nov. 19, 2017). Both of those motions were denied. Stay Add. 1-2, 3-4.

b. Remarkably, after seeking immediate record expansion and discovery, and vigorously opposing the government's mandamus petition, respondents filed their own motion in district court to stay all expansion of the administrative record and all discovery until the district court ruled on both respondents' motion for a preliminary injunction and the government's motion to dismiss. D. Ct. Doc. 190 (Nov. 19, 2017). Respondents volunteered that they sought this relief in an effort to "obviate Defendants' efforts to obtain a stay from the Supreme Court." *Id.* at 4.

c. On November 20, 2017, the district court entered an order staying all discovery until December 22, and "allow[ing] the government an additional month [*i.e.*, until December 22] to compile and to file the augmented administrative record." App., *infra*, 45a. The court directed, however, that "[a]lthough the government need not file until that date, it must promptly locate and compile the additional materials and be ready to file the fully augmented record by December 22." *Id.* at 45a-46a. In all other respects, the court denied respondents' requested stay. *Id.* at 46a.

REASONS FOR GRANTING THE PETITION

The issuance of a writ of mandamus to a lower court is warranted when a party establishes that "(1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance of the writ is "clear and indisputable,"' and (3) 'the writ is appropriate under the circumstances.'" *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004)) (brackets in original). As Judge Watford recognized, all three criteria are plainly met by the district court's extraordinary disregard for settled principles of judicial review of agency action and sweeping intrusions into the internal deliberations and privileged communications of the Executive Branch, including the White House itself. This Court should issue a writ of mandamus directly to the district court correcting these errors. See *ibid.* (This Court may "issue the writ of mandamus directly to a federal district court.").

In the alternative, because the court of appeals' decision is equally inconsistent with the precedents of this Court, and creates a conflict with decisions of the D.C. Circuit on important, recurring issues of judicial review of agency action, this Court may wish to construe this petition as a petition for a writ of certiorari, grant the writ, and reverse the court of appeals' refusal to grant mandamus relief.[3]

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[3] In *Cheney*, which involved circumstances similar to this case, this Court granted the government's certiorari petition but declined to issue extraordinary relief, noting that "this Court wa[s] not presented with an original writ of mandamus." 542 U.S. at 391. Petitioners seek mandamus directly to the district court here because its errors are clear and indisputable.

A. The Government Has No Other Adequate Means To Attain Relief

Absent mandamus relief, the district court's orders will be effectively unreviewable on appeal from final judgment. If the court's order to compile the "complete" administrative record is not immediately vacated and if the orders requiring discovery and public filing of deliberative materials are allowed to take effect, there will be no going back. The White House, DHS, and the Department of Justice (DOJ) will have been required to collect, review, and assert privilege as to thousands of additional documents; numerous deliberative materials will have been made public; various privileges, including executive privilege, will have been breached based on the court's existing erroneous privilege rulings (and any more that follow); and high-ranking government officials will have been deposed. As Judge Watford recognized—and the majority did not dispute—these circumstances "remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable," *Cheney*, 542 U.S. at 381, and they make it a "classic case in which mandamus relief is warranted," App., *infra*, 20a (Watford, J., dissenting).

B. The District Court Clearly And Indisputably Erred By Ordering That Deliberative And Other Materials Be Added To The Administrative Record, Authorizing Broad Discovery, And Summarily Overruling The Government's Assertions Of Privilege

The government's right to a writ of mandamus staying record expansion and discovery is "clear and indisputable." *Perry*, 558 U.S. at 190 (citation omitted).[4] In

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[4] The court of appeals stated in a footnote that "[i]ssues regarding supplementation—as opposed to completion—of the record and the

the name of "complet[ing]" the administrative record and facilitating judicial review, the district court authorized discovery and ordered the production of "all DACA-related materials" considered by any person "anywhere in the government" who provided written or verbal input to the Acting Secretary and "all comments and questions propounded by Acting Secretary Duke" to any person "regarding the actual or potential rescission of DACA and their responses." App., *infra*, 42a-43a. Those materials are expressly defined to include vast categories of deliberative, nonpublic documents, including "all emails, letters, memoranda, notes, media items, opinions and other materials" in the possession of the Acting Secretary's subordinates and advisers. *Id.* at 42a. That order upends fundamental principles of judicial review of agency action in several respects.

1. The district court clearly and indisputably erred by ordering expansion of the administrative record and authorizing intrusive discovery

a. First, the district court plainly erred by authorizing discovery and ordering the government to "complete" the administrative record with materials beyond those presented by the agency to the court. App., *infra*, 42a-43a. This Court has held that, in agency review

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propriety of discovery on the non-APA claims, including the propriety of depositions, are not properly before us at this time, and we do not address them." App., *infra*, 2a-3a n.1. But the government expressly objected to all record expansion and all discovery in the district court, see p. 6, *supra*, and it "respectfully ask[ed] th[e] [court of appeals] to issue a writ of mandamus to stay the district court's order to expand the administrative record * * * and to stay ongoing discovery," Gov't C.A. Mandamus Pet. 1. Those issues therefore were squarely before that court, and they are similarly before this Court.

cases, "[t]he APA specifically contemplates judicial review on the basis of the *agency* record." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (emphasis added). "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* at 743 (brackets and citation omitted). And "[t]he task of the reviewing court is to apply the appropriate APA standard of review * * * to the agency decision based on the record the agency presents to the reviewing court." *Id.* at 743-744.

It is only in cases where the agency has provided no explanation for its decision, or where challengers have made a "strong showing of bad faith or improper behavior," that a district court may go beyond the agency record and "require the administrative officials who participated in the decision to give testimony explaining their action." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971). Where, as here, neither exception has been met, the validity of the agency's action "must * * * stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review," *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973) (per curiam), and "based on the record the agency presents to the reviewing court," *Florida Power & Light*, 470 U.S. at 744. The district court's sweeping expansion of the administrative record—in the face of the Acting Secretary's contemporaneous and reasonable explanation for her decision—directly contradicts this Court's precedents.

The district court's error in ordering discovery and vastly expanding the administrative record is particularly manifest in light of the nature of the agency's decision: a policy determination by the Acting Secretary to wind down, in orderly fashion, a previous policy

of prosecutorial discretion that itself created no substantive rights. As the government has explained in its pending motion to dismiss, see D. Ct. Doc. 114, at 17-20 (Nov. 1, 2017), that decision is unreviewable under 8 U.S.C. 1252(g), which prohibits actions challenging "'deferred action' decisions and similar discretionary determinations * * * outside the streamlined process that Congress has designed"—*i.e.*, after a final decision of removal—*Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999); see *id.* at 485 & n.9, and constitutes an unreviewable exercise of prosecutorial discretion under 5 U.S.C. 701(a)(2), see *Heckler* v. *Chaney*, 470 U.S. 821, 828-835 (1985).

But even assuming the decision is not entirely unreviewable, it was, by its nature, a discretionary statement of policy that did not require any particular evidentiary or other record. The Acting Secretary's explanation for her decision rested on her assessment of the risks presented by (and the ultimate legality of) maintaining a policy (original DACA) that was materially identical to ones (expanded DACA and DAPA) struck down by the Fifth Circuit in a decision affirmed by this Court, and that the plaintiffs who prevailed in that earlier suit intended to challenge before the same court on the same grounds. No factual or evidentiary record is required to evaluate the reasonableness of the Acting Secretary's policy and legal judgment. There is thus no basis for the district court's belief that a search for documents "anywhere in the government" is remotely necessary to make sure that the agency is not "withholding evidence unfavorable to [the Acting Secretary's] position." App., *infra*, 29a, 42a-43a. "Indeed, it would be implausible to think that any such material exists." *Id.* at 18a (Watford, J., dissenting).

The ordered record expansion and discovery are particularly egregious due to the burdens they impose not only on DHS and DOJ, but directly on the highest level of the Executive Branch, the White House itself. This Court held in *Cheney* that discovery directed to the White House raises "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office" and "[t]he high respect that is owed to the office of the Chief Executive." 542 U.S. at 385 (citation omitted; brackets in original). The "public interest requires that a coequal branch of Government * * * give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Id.* at 382.

Just as it was improper for the district court in *Cheney* to require the White House to search for and produce "[a]ll documents concerning any communication relating to the * * * preparation of the" National Energy Policy Development Group's final report, 542 U.S. at 387 (citation omitted), it is improper here for the district court to order that White House officials search for and produce any DACA-related materials considered by anyone "who thereafter provided Acting Secretary Duke" with any written or verbal input on her policy decision, App., *infra*, 42a-43a. That the court did so even before it rules on the government's motion to dismiss and decides whether it can hear this case at all further underscores its failure to heed this Court's command that the "'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney*, 542 U.S. at 389-390 (quoting *United States* v. *Nixon*, 418 U.S. 683, 692 (1974)) (brackets in original).

Respondents cannot evade these limitations on agency review by pointing to their constitutional claims. Constitutional challenges to agency action are governed by the APA just like any other challenge. See 5 U.S.C. 706(2)(B) ("The reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * contrary to constitutional right, power, privilege, or immunity."). Indeed, the limitations imposed by the APA on discovery have particular force where, as here, a suit raises claims of discriminatory motive behind enforcement decisions. In *United States* v. *Armstrong*, 517 U.S. 456 (1996), this Court explained that a "presumption of regularity supports" prosecutorial decisions. *Id.* at 464 (citation omitted). Thus, "in the absence of clear evidence to the contrary, courts presume that [Executive Branch officials] have properly discharged their official duties," *ibid.* (citation omitted), and must apply "rigorous standard[s] for discovery in aid of" discriminatory-enforcement claims, *id.* at 468. And in *AADC*, the Court explained that the concerns animating that rule are "greatly magnified in the deportation context" because of incentives for delay, the continuing nature of immigration violations, and heightened separation-of-powers concerns. 525 U.S. at 489-491.

b. The court of appeals justified the district court's expansion of the record based on its view that, if the administrative record did not include "all documents and materials directly or indirectly considered by agency decision-makers," App., *infra*, 5a (citation and emphasis omitted), the agency's action would "become effectively unreviewable," *id.* at 3a. But that concern is misplaced and evinces a fundamental misconception of a reviewing court's role under the APA.

As this Court has held, in judicial review of agency action, the court "is not generally empowered to conduct a *de novo* inquiry into the matter under review and to reach its own conclusions based on such an inquiry." *Florida Power & Light*, 470 U.S. at 744. Its task is to determine whether the agency's action may be upheld on the basis of the reasons the agency provides and "the record the agency presents to the reviewing court." App., *infra*, 16a (Watford, J., dissenting). If the agency's rationale is reasonable and the record presented supports that rationale, then the reviewing court's inquiry is at an end and the agency's decision must be sustained. If, on the other hand, "the record compiled by the agency is inadequate to support the challenged action," the result is equally straightforward: the agency's decision is vacated and the matter is remanded to the agency for it either to change its decision or to compile a record that will support it. *Ibid.*; see *Florida Power & Light*, 470 U.S. at 744. In either event, judicial review is not thwarted. Rather, the agency's action simply must "stand or fall" on the rationale and the record that the agency has compiled. Thus, it is "the agency [that] bears the risk associated with filing an incomplete record, not the challengers." App., *infra*, 17a (Watford, J., dissenting).

The court of appeals relied heavily on informal guidance provided by DOJ's Environment and Natural Resources Division (ENRD) to its client agencies in 1999. App., *infra*, 10a. The ENRD document suggested that, when compiling an administrative record, an agency should include "all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker." *Ibid.* But that former guidance by ENRD on what its client agencies

should include in the administrative record is not the same as what the APA requires or what a court may order an agency to produce. Precisely because it is the agency that bears the risk of an insufficient record, agencies may, in some instances, choose to include more than the law requires. But, outside of narrow circumstances not present here, that is the agency's decision, not the reviewing court's.[5] See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (Courts may "not stray beyond the judicial province * * * to impose upon the agency [their] own notion of which procedures are 'best.'").

c. The court of appeals posited that separation-of-powers concerns about intruding upon the internal workings of a coordinate Branch were not implicated by the district court's order because the burdens on the

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[5] The ENRD's original 1999 guidance recognized that distinction. See App., *infra*, 32a n.5 (explaining that the guidance was not intended to place any limitations on the "lawful prerogatives of the Department of Justice or any other federal agency" in compiling an administrative record) (citation omitted). And ENRD has reiterated as much on multiple occasions since. See Gov't C.A. Mandamus Pet. Reply Addendum (Reply Add.) 5 (stating that the "1999 document does not dictate any requirement for, or otherwise provide binding guidance to, federal agencies on the assembly of the administrative record," because "[t]he composition of an administrative record is left to the sound discretion of the relevant federal agency, within the bounds of controlling law"); accord *id.* at 7 n.1. The court of appeals found "inexplicabl[e]" the timing of that most recent statement by ENRD. App., *infra*, 11a. But ENRD quite clearly explained that it was prompted by a recent filing by the government in a different case before the Ninth Circuit implicating similar questions. See Reply Add. 7 ("[W]e want to make sure you know that the [*In re*] *Price*[, No. 17-71121,] petition represents the view of the United States on this issue.").

White House result from the completion of the administrative record, not ordinary civil discovery. App., *infra*, 12a-13a. But the court of appeals provided no explanation for why a discovery order issued under the guise of "completing" an administrative record would intrude any less upon the "Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications" than one issued through ordinary civil discovery—and none is apparent. *Cheney*, 542 U.S. at 385.

The court of appeals also stated that "there is no indication that either [the President's] documents or those of the Vice President would fall within the completed administrative record as ordered by the district court." App., *infra*, 13a. But there is simply no basis for that conclusion. Indeed, it would be wholly implausible to assume that neither the President nor Vice President provided any advice to the Acting Secretary concerning her decision. The court of appeals recognized as much elsewhere in its decision. See *id.* at 7a (noting "evidence that [the White House] w[as] involved in the decision to end DACA, including the President's own press release taking credit for the decision"); see also *id.* at 33a-34a (reasoning that "the White House has repeatedly emphasized the President's direct role in decisions concerning DACA").

* * * * *

In short, as Judge Watford explained, "the desire for greater insight into how DHS arrived at its decision is not a legitimate basis for ordering the agency to expand the administrative record, unless [respondents] make a threshold factual showing justifying such action." App., *infra*, 16a. No such showing was made here. *Ibid.*

2. The district court clearly and indisputably erred by ordering expansion of the administrative record to include deliberative materials

a. The district court compounded its error by ordering that deliberative materials be added to the administrative record. This Court has made clear that it is "not the function of the court to probe the mental processes" of the agency. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); see *Overton Park*, 401 U.S. at 420. "Just as a judge cannot be subjected to such a scrutiny, * * * so the integrity of the administrative process must be equally respected." *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (*Morgan II*). Thus, in *Morgan II*, the Court held that the trial court had erred in permitting the deposition of the Secretary of Agriculture "regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates." *Ibid.* And on the basis of these precedents, the D.C. Circuit has long recognized that requests to supplement the administrative record with deliberative materials, such as transcripts of an agency's closed meetings, draft opinions, or internal memoranda, must similarly be rejected absent a strong showing of "bad faith [or] improper conduct." *San Luis Obispo Mothers for Peace* v. *United States Nuclear Regulatory Comm'n*, 789 F.2d 26, 28, 44-45 (en banc) (plurality opinion), cert. denied, 479 U.S. 923 (1986); see *id.* at 45-46 (Mikva, J., concurring in the result); see also *Checkosky* v. *SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (Randolph, J.); *Checkosky*,

23 F.3d at 454 (per curiam) (rejecting petitioners' challenge "as per Part V of Judge Randolph's opinion").[6]

"Agency opinions, like judicial opinions, speak for themselves. And agency deliberations, like judicial deliberations, are for similar reasons privileged from discovery." *Checkosky*, 23 F.3d at 489 (Randolph, J.). Requiring public disclosure and judicial consideration of deliberative materials would "represent an extraordinary intrusion into the realm of the agency" and impede the Executive's ability to "engage in uninhibited and frank discussions," just as a "court could not fully perform its functions" without "assurance[s] of secrecy" for its own deliberative materials. *San Luis Obispo*, 789 F.2d at 44-45.

The APA's provisions governing formal administrative proceedings underscore the point. In that context, the APA provides that the "exclusive record for decision" consists of "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. 556(e). Materials not "filed in the proceeding" pursuant to the agency's procedures, such as internal agency documents memorializing the agency's deliberations or agency personnel's handwritten notes, are categorically outside the administrative record under Section 556(e). Although the APA does not contain a parallel provision prescribing the contents of the administrative record for informal agency actions (like the statement of discretionary enforcement policy here), there is no reason why deliberative agency materials

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[6] See also *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279-1280 (D.C. Cir. 1998); *Kansas State Network, Inc.* v. *FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) ("[A]n agency's action should be reviewed based upon what it accomplishes and the agency's stated justifications.").

should be included in this context. To the contrary, that character of the decision gives the agency more latitude in deciding what belongs in the record it compiles. See *Vermont Yankee*, 435 U.S. at 549.

The district court plainly violated these principles by ordering the production of "all emails, letters, memoranda, notes, media items, opinions and other materials" considered by the Acting Secretary or her subordinates in the course of making her decision to rescind DACA, as well as "all comments and questions propounded by Acting Secretary Duke" to anyone on the subject. App., *infra*, 42a-43a. Indeed, the court justified its action based expressly on its observation that the existing record did not include obviously deliberative materials, such as advice from her subordinates or "legal research" regarding the Attorney General's opinion on the legality of DACA. *Id.* at 38a; see *id.* at 42a-43a. But, as Judge Watford explained, "[d]ocuments analyzing DACA's potential legal infirmities, prepared to assist the Acting Secretary in assessing the gravity of the litigation risk involved, fall squarely within the category of deliberative process materials * * * presumptively outside the scope of what must be included in the administrative record." *Id.* at 18a-19a (Watford, J., dissenting). They are also irrelevant to assessing the reasonableness of the Acting Secretary's legal and policy judgment.

The district court stated that the government could withhold documents as privileged provided that it (1) submits a privilege log listing all withheld documents, including the authors and recipients of each document, the steps taken to ensure the confidentiality of each document, the date of each document, and its subject matter, D. Ct. Doc. 23, at 5 (Sept. 13, 2017), and

(2) "simultaneously lodge[s] full copies of all such materials, indicating by highlighting (or otherwise) the redactions and withholdings," App., *infra*, 43a. But given that such documents are categorically outside the administrative record, the court had no basis for imposing that onerous burden on the government. Nor, in light of the court's treatment of the government's assertions of privilege to date, see pp. 31-32, *infra*, would that course provide any assurance that the district court's procedures would successfully protect the government's privileged communications in any event.

The district court again exacerbated its error by including the White House within its expansion order. This Court in *Cheney* expressly rejected the contention that the White House could sufficiently protect itself against intrusive discovery through individual privilege assertions, holding that the White House should not unnecessarily be placed in the position of having to assert executive privilege. 542 U.S. at 390. As the Court explained, "[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course," and "[t]he Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives." *Id.* at 389. The district court was thus required to "explore other avenues, short of forcing the Executive to invoke privilege." *Id.* at 390.

b. The court of appeals' only justification for the district court's order to produce deliberative materials was that it could not find clear error because the court of appeals had not previously addressed the propriety of such an order. App., *infra*, 14a. But it should have been enough that *this Court* has addressed the subject. See *Florida Power & Light*, 470 U.S. at 744; *Overton Park*,

401 U.S. at 420; *Morgan II*, 313 U.S. at 422; *Morgan*, 304 U.S. at 18. It is not within the authority of the court in an APA suit to probe the mind of the decisionmaker or the agency's internal deliberations.

3. The district court clearly and indisputably erred by summarily dismissing the government's assertions of privilege

Finally, the district court added insult to compounded injury through its dismissive treatment of the government's assertions of privilege over the documents produced for *in camera* review at the court's direction. Despite receiving no briefing regarding any specific assertion of privilege, the court ordered disclosure of 35 documents protected by deliberative-process privilege with no explanation other than a conclusory statement that "[t]he undersigned judge has balanced the deliberative-process privilege factors and determined *in camera*" that the documents must be disclosed. App., *infra*, 43a. Those documents include, among other things, the Acting Secretary's handwritten notes on deliberations regarding the rescission of DACA, on legal advice she received regarding that policy decision, and on the implementation of the wind-down of the DACA policy. Stay Add. 26. The court offered no explanation why such documents were relevant to the court's task on APA review at all, much less why the need for such documents was so compelling as to overcome the presumption against disclosure.

The district court also gravely erred by ordering disclosure of various White House documents covered by executive privilege. The court declared in a footnote that none "of these documents fall[s] within the executive privilege," App., *infra*, 40a n.7, but that cursory statement is flatly incorrect. One of these documents,

for example, is a *memorandum from the White House Counsel to the President*. Stay Add. 26. The court provided no basis for its disregard of executive privilege, which is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708. There is no justification for the court's dismissive treatment of "the Executive's Article II prerogatives." *Cheney*, 542 U.S. at 389.

The district court also seriously erred in declaring that "[d]efendants have waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded." App., *infra*, 39a. The court based that extraordinary ruling on the fact that the Acting Secretary's decision followed consideration of litigation risk and the legality of the DACA policy. Agencies, however, routinely announce their views of what the law requires in the Federal Register, and doing so has never jeopardized attorney-client privilege. Nor does an agency's consideration of a DOJ opinion, a salutary agency practice, especially since the Acting Secretary chose to include that opinion in the administrative record she produced to defend her decision. And even assuming the correctness of the Acting Secretary's legal judgment were ever found relevant to disposition of these cases, assessing its correctness would not depend on the "legal research" used to reach that conclusion. *Id.* at 38a. The court's finding of a blanket waiver of attorney-client privilege was wholly inappropriate.

C. Mandamus Relief Is Appropriate Under The Circumstances

Although the writ of mandamus is extraordinary relief, this Court has explained that it is appropriately used "to confine an inferior court to a lawful exercise of

its prescribed jurisdiction," *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities," *Cheney*, 542 U.S. at 382; and to correct "particularly injurious or novel privilege ruling[s]," *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 110 (2009). The district court's stark departure from "fundamental principles of judicial review of agency action," *Florida Power & Light*, 470 U.S. at 743; its unwarranted intrusions on the "confidentiality and autonomy" of the highest levels of the Executive Branch, *Cheney*, 542 U.S. at 389; and its casual disregard of the government's legitimate assertions of executive and other privileges satisfies each of those justifications for mandamus. The denial of relief here would cause "immediate and irreparable" harm to the government while imposing minimal burdens on respondents, who already requested much of the same relief (in an effort to stave off this Court's review). App., *infra*, 20a. Judge Watford did not overstate matters when he called this a "classic case" for a writ of mandamus. *Ibid.*

CONCLUSION

The Court should issue a writ of mandamus to the district court, ordering it to halt all expansion of the administrative record and discovery. In the alternative, the Court should treat this petition as a petition for a writ of certiorari, grant the petition, and reverse the court of appeals' decision denying the petition for a writ of mandamus below.

Respectfully submitted.

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DECEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-72917

D.C. Nos. 3:17-cv-05211-WHA, 3:17-cv-05235-WHA,
3:17-cv-05329-WHA, 3:17-cv-05380-WHA,
3:17-cv-05813-WHA

Northern District of California, San Francisco

IN RE: UNITED STATES OF AMERICA; DONALD J. TRUMP; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE C. DUKE,

UNITED STATES OF AMERICA; DONALD J. TRUMP; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE C. DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY,
PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,
RESPONDENT,

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; STATE OF CALIFORNIA; STATE OF MAINE; STATE OF MINNESOTA; STATE OF MARYLAND; CITY OF SAN JOSE; DULCE GARCIA; MIRIAM GONZALEZ AVILA; VIRIDIANA CHABOLLA MENDOZA; NORMA RAMIREZ; COUNTY OF SANTA CLARA; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521; JIRAYUT LATTHIVONGSKORN; SAUL JIMENEZ SUAREZ, REAL PARTIES IN INTEREST

Petition for Writ of Mandamus

Argued and Submitted Nov. 7, 2017
Pasadena, California

[Filed: Nov. 16, 2017]

ORDER

Before: WARDLAW, GOULD, and WATFORD, Circuit Judges.

WARDLAW and GOULD, Circuit Judges:

On September 5, 2017, the Acting Secretary of the Department of Homeland Security ("DHS"), Elaine Duke, announced the end of DHS's Deferred Action for Childhood Arrivals policy ("DACA"), effective March 5, 2018. Begun in 2012, DACA provided deferred action for certain individuals without lawful immigration status who had entered the United States as children. Several sets of plaintiffs sued to enjoin the rescission of DACA under the Administrative Procedure Act ("APA") and under various constitutional theories not relevant here.

The merits of those claims are not before us today. The only issue is a procedural one, raised by the government's petition for a writ of mandamus. The government asks us to permanently stay the district court's order of October 17, 2017, which required it to complete the administrative record.[1] *See* Order re

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[1] Issues regarding supplementation—as opposed to completion—of the record and the propriety of discovery on the non-APA claims,

Motion to Complete Administrative Record, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324 (October 17, 2017) ("Order"). We have jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651. Because the district court did not clearly err by ordering the completion of the administrative record, we hold that the government has not met the high bar required for mandamus relief.

One note at the outset: We are not unmindful of the separation-of-powers concerns raised by the government. However, the narrow question presented here simply does not implicate those concerns. We consider only whether DHS failed to comply with its obligation under the APA to provide a complete administrative record to the court—or, more precisely, whether the district court clearly erred in so holding. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision."). This obligation is imposed to ensure that agency action does not become effectively unreviewable, for "[i]f the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). Assuring that DHS complies with this requirement—imposed by the APA on all agencies and embodied in decades of precedent—is undoubtedly a proper judicial function.

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including the propriety of depositions, are not properly before us at this time, and we do not address them here.

1. "The writ of mandamus is a drastic and extraordinary remedy reserved only for really extraordinary cases." *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947) (internal quotation marks omitted)). Indeed, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Ultimately, the issuance of the writ is "in large measure . . . a matter of the court's discretion." *Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019, 1023 (9th Cir. 2014) (quoting *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978)).

Our discretion is guided by the five factors laid out in *Bauman v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1977). However, we need not consider four of those five factors here, because "the absence of factor three—clear error as a matter of law—will always defeat a petition for mandamus." *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016) (quoting *In re United States*, 791 F.3d 945, 955 (9th Cir. 2015)). This factor—whether "[t]he district court's order is clearly erroneous as a matter of law," *Bauman*, 557 F.2d at 654-55—"is significantly deferential and is not met unless the reviewing court is left with a definite and firm conviction that a mistake has been committed." *In re Bundy*, 840 F.3d at 1041 (quoting *In re United States*, 791 F.3d at 955).

2. The district court's order is not clearly erroneous as a matter of law. APA § 706 provides that arbitrary and capricious review shall be based upon "the

whole record or those parts of it cited by a party." 5 U.S.C. § 706. The whole record "includes everything that was before the agency pertaining to the merits of its decision." *Portland Audubon*, 984 F.2d at 1548; *see also, e.g., James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("The administrative record includes all materials compiled by the agency that were before the agency at the time the decision was made.") (internal quotation marks and citations omitted). More specifically, we have explained that the whole administrative record "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks omitted); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (same). The record is thus not necessarily limited to "those documents that the *agency* has compiled and submitted as 'the' administrative record." *Thompson*, 885 F.2d at 555 (internal quotation marks omitted).

At the initial case management conference before the district court, the government agreed to produce the complete administrative record on October 6, 2017. On that date, the government submitted as "the" administrative record fourteen documents comprising a mere 256 pages, all of which are publicly available on the internet. Indeed, all of the documents in the government's proffered record had previously been included in filings in the district court in this case, and 192 of its 256 pages consist of the Supreme Court, Fifth Circuit,

and district court opinions in the *Texas v. United States* litigation.[2]

Faced with this sparse record, and on the plaintiffs' motion (opposed by the government), the district court ordered the government to complete the record to include, among other things, all DACA-related materials considered by subordinates or other government personnel who then provided written or verbal input directly to Acting Secretary Duke. The district court excluded from the record documents that it determined *in camera* are protected by privilege. Order at *8.

3. The administrative record submitted by the government is entitled to a presumption of completeness which may be rebutted by clear evidence to the contrary. *Bar MK Ranches*, 994 F.2d at 740; *see also Thompson*, 885 F.2d at 555 (noting that the administrative record "is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record."). The district court correctly stated this legal framework and concluded that the presumption of completeness had been rebutted here. Order at *5. This conclusion was not clear legal error: Put bluntly, the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people[3] based solely

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[2] That lawsuit challenged a related but distinct deferred action policy, Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. *See United States v. Texas*, 136 S. Ct. 2271 (2016); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015); *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[3] *See* U.S. Citizenship and Immigration Services, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Sta-*

on 256 pages of publicly available documents is not credible, as the district court concluded.[4]

The district court identified several specific categories of materials that were likely considered by the Acting Secretary or those advising her, but which were not included in the government's proffered record. For example, the record contains no materials from the Department of Justice or the White House—other than a one-page letter from Attorney General Jefferson B. Sessions—despite evidence that both bodies were involved in the decision to end DACA, including the President's own press release taking credit for the decision.[5] Nor does the proffered record include any documents from Acting Secretary Duke's subordinates; we agree with the district court that "it strains credulity" to suggest that the Acting Secretary decided to terminate DACA "without consulting one advisor or subordinate within DHS." Order at *4. And the proffered record contains no materials addressing the change of position between February 2017—when then-Secretary John Kelly affirmatively decided *not* to end DACA—and Acting Secretary Duke's September 2017 decision to do the exact opposite, despite the principle that reasoned agency decision-making "ordinarily de-

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tus Fiscal Year 2012-2017 (June 30) (Sept. 20, 2017), goo.gl/UcGJww.

[4] The dissent agrees that "a policy shift of that magnitude presumably would not have been made without extensive study and analysis beforehand." Dissent at 1.

[5] *See* Press Release, White House Office of the Press Secretary, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law.

mand[s] that [the agency] display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

At oral argument, the government took the position that because the Acting Secretary's stated justification for her decision was litigation risk, materials unrelated to litigation risk need not be included in the administrative record. Simply put, this is not what the law dictates. The administrative record consists of all materials "*considered by* agency decision-makers," *Thompson*, 885 F.2d at 555 (emphasis added), not just those which support or form the basis for the agency's ultimate decision. *See also, e.g.*, *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) ("[A] complete administrative record should include all materials that 'might have influenced the agency's decision,' and not merely those on which the agency relied in its final decision.") (quoting *Bethlehem Steel v. EPA*, 638 F.2d 994, 1000 (7th Cir. 1980)). And even if the record were properly limited to materials relating to litigation risk, the district court did not clearly err in concluding that it is implausible that the Acting Secretary would make a litigation-risk decision "without having generated any materials analyzing the lawsuit or other factors militating in favor of and against the switch in policy." Order at *4.

It was therefore not clear error for the district court to conclude that the presumption of regularity that attaches to the government's proffered record is rebutted, and that ordering completion of the record was necessary and appropriate.

4. Nor did the district court clearly err in identifying the materials that should have been included within the scope of the complete administrative record. The government challenges the decision to include materials considered by subordinates who then briefed the Acting Secretary, but this decision was not clear legal error. We have held that the record properly includes "all documents and materials directly or *indirectly* considered by agency decision-makers," *Thompson*, 885 F.2d at 555, but have not yet clarified the exact scope of "indirectly considered." District courts in this and other circuits, however, have interpreted that phrase to include materials relied on by subordinates who directly advised the ultimate decision-maker. *See, e.g.*, *Nat. Res. Def. Council v. Gutierrez*, No. C 01-0421 JL, 2008 WL 11358008, at *6 (N.D. Cal. Jan. 14, 2008) ("To the extent [the government argues] that only those documents that reached [the agency's] most senior administrators were in fact 'considered,' courts have rejected that view as contrary to the Ninth and other Circuits' pronouncements. . . ."); *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 212 F. Supp. 3d 1348, 1352 (N.D. Ga. 2016) ("Documents and materials indirectly considered by agency decision-makers are those that may not have literally passed before the eyes of the decision-makers, but were so heavily relied on in the recommendation that the decisionmaker constructively considered them."); *Amfac Resorts*, 143 F. Supp. 2d at 12 ("[I]f the agency decisionmaker based his decision on the work and recommendations of subordinates, those materials should be included as well.").[6]

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[6] We also note that the government has conceded in other cases

Moreover, as noted in the district court's October 17 order, a Department of Justice guidance document directs agencies compiling the administrative record to "[i]nclude all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, *even though the final decision-maker did not actually review or know about the documents and materials.*" U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record 3 (Jan. 1999) (emphasis added). It further provides that the administrative record should include "communications the agency received from other agencies . . . documents and materials that support *or* oppose the challenged agency decision . . . minutes of meetings or transcripts thereof . . . [and] memorializations of telephone conversations and meetings, such as a memorandum or handwritten notes." *Id.* at 3-4. The district court's October 17 order complies with this Department of Justice guidance; the government's proffered record does not.

We recognize that such guidance is not binding; we nevertheless find it persuasive as a statement by the Department of Justice as to what should be included in a complete administrative record. We also note that the guidance document DHS failed to comply with here

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that documents relied on by subordinates are properly part of the administrative record. *See Oceana, Inc. v. Pritzker*, No. 16-cv-06784-LHK (SVK), 2017 WL 2670733, at *4 (N.D. Cal. June 21, 2017) ("Defendants acknowledge . . . that a decision-maker can be deemed to have 'constructively considered' materials that, for example, were relied on by subordinates. . . .").

was inexplicably rescinded the very same day that the government filed this petition for a writ of mandamus.

Given that the district court's interpretation of *Thompson* is consistent with the rulings of other district courts, comports with the Department of Justice's guidance on administrative records, and is not foreclosed by Ninth Circuit authority, we cannot say that the district court's interpretation was clearly erroneous as a matter of law. *See In re Swift Transp. Co.*, 830 F.3d 913, 916-17 (9th Cir. 2016) ("It is well established that '[t]he absence of controlling precedent weighs strongly against a finding of clear error [for mandamus purposes].'") (quoting *In re Van Dusen*, 654 F.3d at 845).[7]

5. The district court's order that the government complete the record with documents considered by former DHS Secretary John Kelly in the course of deciding not to terminate DACA in February 2017 also withstands mandamus scrutiny. This is not because of some freestanding requirement that all the materials underlying a previous decision on a similar subject are always part of the administrative record; rather, it simply recognizes that both decisions were part of an

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[7] There is tension within our decisions about whether controlling Ninth Circuit precedent is a *necessary* precondition to finding clear error as a matter of law. *Compare In re Swift Transp. Co.*, 830 F.3d at 917 ("If 'no prior Ninth Circuit authority prohibited the course taken by the district court, its ruling is not clearly erroneous.'") (quoting *In re Morgan*, 506 F.3d 705, 713 (9th Cir. 2007)), *with Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010) ("[T]he necessary clear error factor does not *require* that the issue be one as to which there is established precedent.") (emphasis added). At a minimum, however, the lack of such authority "weighs strongly" against finding clear error. *In re Swift Transp. Co.*, 830 F.3d at 916.

ongoing decision-making process regarding deferred action: In February 2017, Secretary Kelly ended other prioritization programs, but left DACA and DAPA in place; in June 2017, Secretary Kelly ended DAPA but left DACA intact; finally, in September 2017, Acting Secretary Duke ended DACA. The materials considered by Secretary Kelly in the course of deciding against ending DACA in February 2017 did not cease to be "before the agency" for purposes of the administrative record during that seven-month evolution in policy. *Thompson*, 885 F.2d at 555-56. The district court's decision to order their inclusion in the record was therefore not clear legal error.

6. Finally, the government makes two categorical arguments with respect to privilege.[8] First, it contends that *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), bars the completion of the administrative record with any White House materials, because requiring White House officials to search for and assert privilege as to individual documents would be an unwarranted intrusion into executive decision-making. *Cheney*, of course, did not involve an administrative agency's obligation under the APA to provide the court with the record underlying its decision-making. It instead involved civil discovery requests that the Supreme Court described variously as "overbroad" and as "ask[ing] for everything under the sky." *Id.* at 383, 387. We do

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[8] The government also appears to challenge the district court's individual privilege determinations, but it has provided little in the way of argument regarding the specific documents ordered disclosed by the district court. We are unable to conclude that the government has met its burden of showing that the district court's privilege analysis was clearly erroneous as a matter of law.

not read *Cheney* as imposing a categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents.

Moreover, the reasoning of *Cheney* appears to be based substantially on the fact that the Vice President himself was the subject of discovery. *See id.* at 381 ("Here, however, the Vice President and his comembers on the NEPDG are the subjects of the discovery orders."), 382 ("These separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President."). Here, although the government is of course correct that the President is named as a defendant in some of the underlying lawsuits, there is no indication that either his documents or those of the Vice President would fall within the completed administrative record as ordered by the district court. *Cheney* therefore does not render the district court's order clearly erroneous.

Second, the government argues that it was clear legal error to require a privilege log and to evaluate documents allegedly protected by the deliberative process privilege on an individual basis, since "deliberative" materials are not properly within the administrative record at all. As noted above, the district court reviewed *in camera* each of the documents as to which the government asserted the deliberative process privilege, and ordered the inclusion of only those documents that met the balancing standard laid out in *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The court stated that it would similarly review

in camera any additional documents as to which the government claims privilege in the future. Order at *8.

As the government acknowledges, we have not previously addressed whether assertedly deliberative documents must be logged and examined or whether the government may exclude them from the administrative record altogether. However, many district courts within this circuit have required a privilege log and *in camera* analysis of assertedly deliberative materials in APA cases. *See, e.g., Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590, 2017 WL 1709318, at *5 (N.D. Cal. May 3, 2017); *Inst. for Fisheries Res. v. Burwell*, No. 16-cv-01574 VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017); *California* ex rel. *Lockyer v. U.S. Dep't of Agric.*, No. C05-03508 EDL, 2006 WL 708914, at *4 (N.D. Cal. March 16, 2008). Again, "the absence of controlling precedent" and the practice of the district courts "weigh[] strongly against a finding of clear error" for purposes of mandamus. *In re Swift Transp. Co.*, 830 F.3d at 916-17 (citation omitted).

We further note that the "deliberative" materials at issue in the main case cited by the government, *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), were transcripts of literal deliberations among the members of a multi-member agency board. *See id.* at 44. Where—as in *Mothers for Peace*—an agency is headed by a multi-member board, the deliberations among those members are analogous to the internal mental processes of the sole head of an agency, and thus are generally not within the scope of the administrative record. *Cf. Portland Audubon*, 984 F.2d at 1549 (distinguishing *Mothers for Peace* as involving

"the internal deliberative processes of *the agency* [and] the mental processes of *individual agency members*") (emphases added). No such deliberations among a multi-member agency are at issue here. The district court's decision to require a privilege log and evaluate claims of privilege on an individual basis before including documents in the record was not clearly erroneous as a matter of law.

* * *

The district court's October 17, 2017 order represents a reasonable approach to managing the conduct and exigencies of this important litigation—exigencies which were dictated by the government's March 5, 2018 termination date for DACA. In order for the government to prevail in its request for the extraordinary remedy of mandamus, we must be "left with a definite and firm conviction that a mistake has been committed." *In re Bundy*, 840 F.3d at 1041 (quoting *In re United States*, 791 F.3d at 955). We are left with no such conviction here, and mandamus relief is therefore not appropriate.

Accordingly, the stay of proceedings entered on October 24, 2017 is lifted.

PETITION DENIED.

In re United States of America, No. 17-72917

WATFORD, Circuit Judge, dissenting:

I understand why the district court ordered the Department of Homeland Security (DHS) to provide a more fulsome administrative record. The agency's decision to rescind DACA will profoundly disrupt the lives of hundreds of thousands of people, and a policy shift of that magnitude presumably would not have been made without extensive study and analysis beforehand. But the desire for greater insight into how DHS arrived at its decision is not a legitimate basis for ordering the agency to expand the administrative record, unless the plaintiffs make a threshold factual showing justifying such action. They have not done so here. As a result, I think the district court's order constitutes "a clear abuse of discretion," and the burden imposed by the order is exceptional enough to warrant the extraordinary remedy of mandamus. *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 380 (2004).

The district court's order violates two well-settled principles governing judicial review of agency action under the Administrative Procedure Act. The first is that a court ordinarily conducts its review "based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). If the record compiled by the agency is inadequate to support the challenged action, the reviewing court will usually be required to vacate the agency's action and remand for additional investigation or explanation. *Florida Power*, 470 U.S. at 744.

So in most cases the agency bears the risk associated with filing an incomplete record, not the challengers.

The second principle is that documents reflecting an agency's internal deliberative processes are ordinarily not part of the administrative record. *See In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998); *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983). An agency generally has no obligation to include documents that were prepared to assist the decision-maker in arriving at her decision, such as memos or emails containing opinions, recommendations, or advice. These pre-decisional materials are not deemed part of the administrative record because they are irrelevant to the reviewing court's task. The court's function is to assess the lawfulness of the agency's action based on the reasons offered by the agency, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983), not to "probe the mental processes" of agency decision-makers in reaching their conclusions. *Morgan v. United States*, 304 U.S. 1, 18 (1938). Requiring routine disclosure of deliberative process materials would also chill the frank discussions and debates that are necessary to craft well-considered policy. *See Assembly of the State of California v. Department of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 789 F.2d 26, 45 (D.C. Cir. 1986) (en banc) (plurality opinion).

There are exceptions to these general rules. First, expansion of the record may be required when the agency fails to make formal findings and thus leaves

the reviewing court unable to discern the agency's reasons for taking the action that it did. *See Public Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982). (This exception doesn't apply here because the memo issued by the Acting Secretary explicitly states her asserted reason for rescinding DACA: concern that the program would be invalidated in threatened litigation.) Second, the record may be expanded if there is evidence that the agency cherry-picked the materials it included by omitting factual information undermining the conclusions it reached. *See Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993). And third, documents reflecting an agency's internal deliberations may on occasion be made part of the record, but only if the challengers make "a strong showing of bad faith or improper behavior" on the part of agency decision-makers. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *In re Subpoena Duces Tecum*, 156 F.3d at 1279-80.

The plaintiffs have not made the showing necessary to trigger either of the latter two exceptions. They have not shown any likelihood that factual information considered by the Acting Secretary and relevant to her decision has been omitted from the record. Indeed, it would be implausible to think that any such material exists, given the nature of the reason asserted by the Acting Secretary for rescinding DACA. Concern over the program's vulnerability to legal challenge would rest not on factual information but on the legal analysis of lawyers. Documents analyzing DACA's potential legal infirmities, prepared to assist the Acting Secretary in assessing the gravity of the litigation risk in-

volved, fall squarely within the category of deliberative process materials mentioned above. They are presumptively outside the scope of what must be included in the administrative record (and may be privileged in any event).

Nor have the plaintiffs attempted at this stage of the case to show bad faith or improper behavior on the part of the Acting Secretary. To be sure, they assert in their brief that they suspect her stated reason for rescinding DACA is pretextual. But bare assertions of that sort fall far short of the showing needed to overcome the presumption that agency decision-makers have acted for the reasons they've given.

Because the plaintiffs have failed to establish that any of these exceptions apply, I don't think the district court's order can stand. The court directed DHS to include in the administrative record all DACA-related "emails, letters, memoranda, notes, media items, opinions, and other materials" considered by the Acting Secretary, and all such materials considered by any other government official—including officials from the Department of Justice and the White House—who provided the Acting Secretary with written or verbal input on the decision to rescind DACA. The court further expanded the record to include "all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of DACA and their responses."

In my view, the district court exceeded the scope of its lawful authority to expand the administrative record. The order sweeps far beyond materials related to the sole reason given for rescinding DACA—its supposed unlawfulness and vulnerability to legal challenge.

The order requires the inclusion of all documents mentioning DACA-related issues of any sort, and is overbroad for that reason alone. But even if the order had been limited to documents analyzing the risk that DACA might be invalidated, those materials are deliberative in character and thus could not be made part of the administrative record absent a showing of bad faith or improper behavior. And to the extent the order will compel the production of communications between the Acting Secretary and high-level officials in the White House—including, potentially, the President himself—the order raises the same sensitive separation-of-powers concerns that made mandamus relief appropriate in *Cheney*. *See* 542 U.S. at 389-90.

These departures from settled principles are enough to establish that the district court's order is "clearly erroneous as a matter of law," which is the most important of the factors we consider when deciding whether to grant mandamus relief. *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016). The other factors weigh in favor of granting relief as well. The order isn't immediately appealable, and if relief is denied the harm inflicted will be immediate and irreparable. As the declarations submitted by the government attest, the search for documents responsive to the court's order will be burdensome and intrusive, given the large number of government officials who may have provided written or verbal input to the Acting Secretary. And the damage caused by public disclosure of otherwise privileged materials can't be undone following an appeal from the final judgment.

This strikes me as a classic case in which mandamus relief is warranted, and I would therefore grant the writ.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Nos. C 17-05211 WHA, C 17-05235 WHA, C 17-05329 WHA, C 17-05380 WHA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND ELAINE DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, DEFENDANTS

[Sept. 22, 2017]

CASE MANAGEMENT ORDER FOR ALL DACA ACTIONS IN THIS DISTRICT

After a case management conference at which counsel in all four cases spoke and with the benefit of some agreements, the Court now sets the following case management schedule for all DACA cases in this district:

1. The four above-numbered civil actions in this district all challenge the rescission of the DACA program by the United States Department of Homeland Security. All of these related cases

will be coordinated (and possibly later consolidated for trial) as follows.

2. The four sets of plaintiffs are referred to collectively herein as "all plaintiffs," and various defendants in the four cases are referred to collectively herein as "all defendants."

3. All parties shall serve their initial disclosures under FRCP 26, and all defendants shall file and serve the administrative record by **NOON ON OCTOBER 6, 2017.** After a party makes its FRCP 26 disclosure, it may take discovery. All plaintiffs shall be permitted to serve up to a combined total of **TWENTY INTERROGATORIES** and **TWENTY DOCUMENT REQUESTS**, all narrowly directed, plus a reasonable number of depositions. All defendants may serve an equal number of interrogatories and document requests plus a reasonable number of depositions. The time to respond to all discovery requests is cut in half. All discovery disputes are hereby **REFERRED** to **MAGISTRATE JUDGE SALLIE KIM** to be heard and determined on an expedited schedule.

4. A tutorial on DACA, the history of "deferred action," the history of APA rulemaking for deferred action programs and for analogous contexts, and immigration procedure generally is set for **OCTOBER 3, 2017, AT 8:00 A.M.** One or more counsel for each side shall present. Please avoid argument and adhere to updating the judge on the historical and administrative context.

5. Motions for summary judgment, provisional relief, or to dismiss are due by **NOON ON NOVEMBER 1, 2017.** All plaintiffs shall file one joint brief on their statutory claims, and another on their constitutional claims, each brief limited to **25 PAGES.** A plaintiff may, if truly essential, add a very short supplemental brief on any point unique to that plaintiff. All defendants may file a joint brief in support of their own motion of up to **50 PAGES** but the Court would prefer that the briefing be divided between two memoranda, one devoted to statutory claims and one devoted to constitutional claims, both adding to fifty or fewer pages. Any amicus brief must be filed on the same date as the brief it supports, each limited to **15 PAGES.** Amici may not submit evidentiary material, so their briefs should include everything within their 15 pages.

6. Summary judgment and provisional relief motions must be supported by proper declarations under oath. Simply attaching exhibits to briefs will not do. Foundation must be laid under oath. Motions to dismiss, however, need only be directed to the complaints, but if extraneous matter is referenced, then it too must be supported by declaration.

7. Oppositions are due by **NOON ON NOVEMBER 22, 2017.** The oppositions shall be organized to mirror the organization of the openings. No brief shall exceed the length of the relevant opening brief. All plaintiffs shall file a single joint opposition, and all defendants shall file a

single joint opposition, each party being permitted to file a short individual supplement to the extent truly needed for issues unique to that party.

8. There will be no page limit on declarations and exhibits, but please be reasonable. All exhibits for a side should be included in that side's joint and tabbed appendix of exhibits (the tabs should protrude for ease of reference). The "individual" exhibits should be included in the joint appendix as well. The exhibits should be numbered. The appendix, however, should not include any item already in the administrative record. Please highlight in yellow any cited passage. Declarations laying foundation for admissibility may simply refer to the exhibits by tab number.

9. Reply briefs are due by **NOON ON DECEMBER 8, 2017**. The replies shall be organized to mirror the organization of the openings (and the oppositions). The briefs shall not exceed half of the pages used in the opposition briefs to which they respond (not to exceed **30 PAGES** in any event). There shall be no reply declarations except for very good cause, the Court being of the view that it is unfair for a movant to deprive the other side of its chance to respond to evidentiary material. If a brief quotes from any deposition or other exhibit, then the brief should quote the entire passage, not just the helpful part. Please do the same for quotations from case law.

10. A hearing on all motions is set for **DECEMBER 20, 2017, AT 8:00 A.M.**

11. If necessary, a **BENCH TRIAL** will be held on **FEBRUARY 5, 2018, AT 7:30 A.M.**, with a **FINAL PRETRIAL CONFERENCE** to be held on **JANUARY 24, 2018, AT 2:00 P.M.**

For now, all filings should be made in any civil action to which they pertain *and*, for the sake of coordination, in the low-numbered action (No. C 17-05211 WHA). Counsel shall confer and recommend any better way of organizing the filing system for these cases, including, for example, the possibility of filing everything in the low-numbered action and thereby deeming it to be filed in all actions. Counsel may also stipulate to tweaks in the wording of this order (but not to its substance or timeline). Any such fully-stipulated modifications must be submitted by **SEPTEMBER 29, AT NOON**, failing which this order shall control.

IT IS SO ORDERED.

Dated: Sept. 22, 2017.

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Nos. C 17-05211 WHA, C 17-05235 WHA,
C 17-05329 WHA, C 17-05380 WHA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND ELAINE DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, DEFENDANTS

[Oct. 17, 2017]

ORDER RE MOTION TO COMPLETE ADMINISTRATIVE RECORD

INTRODUCTION

Under the Administrative Procedure Act, plaintiffs seek to compel completion of the administrative record. Federal defendants oppose. For the reasons herein, plaintiffs' motion is **GRANTED IN PART** and **DENIED IN PART.**

STATEMENT

On June 15, 2012, the Secretary of the Department of Homeland Security issued a memorandum promul-

gating a deferred action policy for those without lawful immigration status who came to the United States as children, were continuous residents in the United States for at least five years, had graduated from high school, obtained a GED, or served in the military, and met certain other criteria—a memorandum and policy known as Deferred Action for Childhood Arrivals, "DACA" for short (Dkt. No. 64-1 at 1-3).[1]

After the change in administrations in 2017, the new Secretary of DHS, John Kelly, announced that DACA would be continued notwithstanding the rescission of other immigration policies (*id.* at 230). This was done despite, and with the knowledge of, the decision of the Court of Appeals for the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), invalidating a different deferred action policy and the Supreme Court's affirmance of that decision by an equally divided vote, *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

On September 5, 2017, however, the Acting Secretary of DHS, Elaine Duke, reversed the agency's position and announced DACA's end, effective March 5, 2018.

We now have five lawsuits in this district challenging that rescission.[2] Each action is proceeding on a parallel track and on the same schedule, which sched-

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[1] All docket numbers herein refer to the docket in Case No. C 17-05211 WHA.

[2] There are two additional DACA lawsuits proceeding in the Eastern District of New York before Judge Nicholas Garaufis, *State of New York v. Trump*, Case No. 17-cv-05228 NGG, and *Vidal v. Baran*, Case No. 16-cv-04756 NGG.

ule was designed to reach a decision on the merits and to allow appellate review by the March 5 deadline.[3]

Pursuant to the scheduling order, the federal defendants filed the administrative record on October 6. It consisted of fourteen documents spanning 256 pages, each of which was already available to the public, and had, in fact, already been filed in this action (Dkt. No. 49 ¶ 3; Dkt. No. 64-1).

In unison, plaintiffs now move to require completion of the administrative record in accordance with Section 706 of Title 5 of the United States Code. They argue that the current record is incomplete because it contains only documents personally considered by the Acting Secretary (and then only some considered by her) and excludes any and all other documents that indirectly led to the rescission.

The federal defendants oppose, arguing that they have already filed a complete administrative record, which they contend is properly limited to unprivileged documents actually considered by the "decision-maker," here, the Acting Secretary (Opp. at 8-9).

This order follows full briefing and oral argument and the Court's review of all materials *in camera* that appeared on the government's privilege log.

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[3] The fifth lawsuit, *County of Santa Clara v. Trump*, Case No. 17-cv-05813 HRL, was related after plaintiffs' motion was fully briefed and argued.

ANALYSIS

1. SCOPE OF THE ADMINISTRATIVE RECORD.

Section 706 of the APA provides that judicial review of agency action shall be based on "the whole record." The administrative record "is not necessarily those documents that the agency has compiled and submitted as the administrative record" but rather "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989). This includes not only documents that "literally pass[ed] before the eyes of the final agency decision maker" but also documents that were considered and relied upon by subordinates who provided recommendations to the decisionmaker. *People of State of Cal. ex rel. Lockyer v. United States Dep't of Agriculture*, Nos. C05-3508 & C05-4038, 2006 WL 708914, at *2 (N.D. Cal. Mar. 16, 2006) (Magistrate Judge Elizabeth Laporte) (internal citations and quotations omitted); *see also Amfac Resorts, L.L.C. v. United States Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (Judge Royce Lamberth).

The requirement that a reviewing court consider "the whole record" before rendering a decision "ensures that neither party is withholding evidence unfavorable to its position and that the agencies are not taking advantage of post hoc rationalizations for administrative decisions. *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

While it is presumed that the administrative record submitted by defendants is complete, plaintiffs can re-

but this presumption with "clear evidence to the contrary." *Cook Inletkeeper v. EPA*, 400 F. App'x 239, 240 (9th Cir. 2010) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)).

Defendants contend a showing of bad faith or impropriety is required in order to compel a complete production of the administrative record. This is incorrect. True, bad faith is one basis for requiring supplementation of an administrative record, but it is not the exclusive basis. Our court of appeals has repeatedly recognized other grounds for requiring supplementation, including where it appears the "agency relied on documents not [already] included in the record." *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); *see also Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

The "bad faith" standard of *Overton Park* applies where, though an administrative record exists, plaintiffs ask to go beyond the record that was before the agency and inquire into the thought processes of decision-makers—in *Overton Park*, by taking the testimony of agency officials. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Our plaintiffs are not seeking materials beyond what were already considered, directly or indirectly, by the decision-maker, and therefore need not show bad faith. Supplementation is appropriate if they show, by clear evidence, that the agency relied on materials not already included in the record. *See Portland Audubon*

Soc. v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (distinguishing between materials "never presented to the agency" and materials that were "allegedly [] before the agency"); *Fence Creek Cattle Co.*, 602 F.3d at 1131.

Nor is defendants' contention that it need only produce documents directly considered by the Acting Secretary correct. Documents reviewed by subordinates, or other agencies who informed her on the issues underlying the decision to rescind DACA, either verbally or in writing, should be in the administrative record. *See Lockyer*, 2006 WL 708914, at *2. The threshold question is whether plaintiffs have shown, by clear evidence, that the record defendants produced is missing documents that were considered, directly or indirectly, by DHS in deciding to rescind DACA.[4]

2. PLAINTIFFS' SHOWING OF INCOMPLETENESS.

Here, the tendered administrative record consists merely of fourteen documents spanning 258 pages, which defendants contend constitute the entire record considered in making the decision to rescind DACA. These are plainly pertinent materials, although all

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[4] Defendants also argue that they should not be required to produce any administrative record whatsoever because the Department of Homeland Security's decision to end DACA was an exercise of prosecutorial discretion not subject to judicial review (Opp. at 1). Earlier in these actions, our defendants agreed to produce the administrative record by October 6, and were then ordered to do so. They may not now renege on that commitment. At this stage, defendants are required to produce an administrative record. Should they prevail on this argument on their eventual motion to dismiss, it will be with the benefit of a proper administrative record.

were publicly known and already part of the pleadings herein.

Plaintiffs seek additional materials including emails, departmental memoranda, policy directives, meeting minutes, materials considered by Secretary Duke's subordinates, communications from White House officials or staff, communications from the Department of Justice, and communications between DHS and state authorities, which they contend should necessarily be part of the administrative record (Br. at 9-10).

Plaintiffs drew this list, in part, from a United States Department of Justice Guidance, which sets forth non-binding recommendations for how to compile an administrative record and what to include. United States Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999). Specifically, the Guidance states that the administrative record should "[i]nclude all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials." *Id.* at 3. It further provides that the record should include "communications the agency received from other agencies . . . documents and materials that support *or* oppose the challenged agency decision . . . minutes of meetings or transcripts thereof . . . [and] memorializations of telephone conversations and meetings, such as memorandum or handwritten notes."[5]

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[5] A 2008 DOJ memorandum specifically notes that the 1999 Guidance is a non-binding internal document, which does not "limit the

Plaintiffs contend that communications from DOJ and the White House are a critical part of "the whole record" due to their significant public participation in the process of rescinding DACA. Plaintiffs first point to Attorney General Sessions' September 4 letter, which DHS expressly relied upon in its memorandum terminating the program (*see* Dkt. No. 64-1 at 251, 255). Despite this critical and publicly disclosed role in the decision, the only DOJ document defendants include in the record is this one-page September 4 letter. This, plaintiffs contend, is clear evidence that defendants omitted documents supporting (or contradicting) the opinions set forth in Attorney General Sessions' letter, in particular the opinion that DACA was unlawfully implemented.

Additionally, the White House has repeatedly emphasized the President's direct role in decisions concerning DACA. For example, a September 5 White House press release announced "President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration" by rescinding DACA, and repeatedly stated that "President Trump" had acted to end the program. Press Release, The White House Office of the Press Secretary, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigra-

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otherwise lawful prerogatives of the Department of Justice or any other federal agency" (Dkt. No. 71-1 at 3). In particular, the 2008 memorandum takes issue with outside parties' use of the Guidance in litigation to advocate for a particular composition of the administrative record or process for its assembly (*ibid.*). Recognizing that the 1999 Guidance is not binding upon agencies, this order finds that the Guidance nevertheless provides helpful insight into the types of documents and materials an agency should consider when assembling an administrative record.

tion (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law. Other articles likewise emphasize White House officials' roles in decision-making regarding DACA. *See, e.g.*, Michael D. Shear & Julie Hirschfeld Davis, Trump Moves to End DACA and Calls on Congress to Act, *New York Times* (Sept. 5, 2017). Moreover, defendants concede in their response that Secretary Duke "received advice from other members of the executive branch" in making her decision (Opp. at 17) and refer to "White House memorandum" in their privilege log (Dkt. No. 71-2). And at oral argument, counsel for defendants said it was likely Secretary Duke had received verbal input before making her decision. Despite this, defendants have failed to provide even a single document from any White House officials or staff.

Plaintiffs further observe that not a single document from one of Secretary Dukes' subordinates is in the record. It strains credulity to suggest that the Acting Secretary of DHS decided to rescind a program covering 800,000 enrollees without consulting one advisor or subordinate within DHS. Again, at oral argument, government counsel represented that she had likely received verbal input. The government's *in camera* submission confirms that she did receive substantial DACA input.

Finally, former DHS Secretary John Kelly issued a memorandum in February 2017, in which he rescinded all DHS memoranda that conflicted with newly stated immigration enforcement policies—*but expressly declined to rescind DACA* (Dkt. No. 64-1 at 229-30). This decision, of course, is directly contrary to that

taken by Acting Secretary Duke seven months later. The administrative record, however, omits all materials explaining the change in position from February to September, with two exceptions—(1) a June 29 letter from Ken Paxton, the Attorney General of Texas, to Attorney General Sessions, in which he threatens to amend the suit challenging DAPA to also challenge DACA if it is not rescinded by September 5, and (2) Attorney General Sessions' September 4 letter to Secretary Duke expressing the opinion that DHS should rescind DACA. Reasoned agency decision-making ordinarily "demand[s] that [the agency] display awareness that it is changing position" and "show that there are good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Accordingly, "the whole record" would ordinarily contain materials giving a "reasoned explanation . . . for disregarding the facts and circumstances that underlay or were engendered by the prior policy." *Ibid.* It is simply not plausible that DHS reversed policy between February and September because of one threatened lawsuit (never actually filed) without having generated any materials analyzing the lawsuit or other factors militating in favor of and against the switch in policy.

Based on the foregoing, plaintiffs have clearly shown that defendants excluded highly relevant materials from the administrative record and in doing so have rebutted the presumption that the record is complete.

Defendants' argument to the contrary is unpersuasive. Their position that only selected documents that Acting Secretary Duke personally reviewed need be part of the administrative record must yield to legal

authority requiring both directly and *indirectly* considered documents be included in the record, *see, e.g.*, *Thompson*, 885 F.2d at 555-56, and by public statements illustrating both DOJ and the White House's direct involvement in the decision to rescind DACA. The rule that government counsel advocates would allow agencies to contrive a record that suppresses information actually considered by decision-makers and by those making recommendations to the decision-makers, information that might undercut the claimed rationale for the decision.

As stated, privilege log entries reveal several documents that were considered in arriving at the decision to rescind DACA. For example, at least seven entries refer to commentary in media articles regarding DACA. At oral argument, government counsel admitted that the Acting Secretary had seen several media items on the issue. There were not, however, any media articles on DACA in the administrative record, but those that came to the Acting Secretary should, of course, be included.[6]

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[6] Many documents were evidently excluded in their entirety based on an assertion of "deliberative-process" privilege. Any "[f]actual portions of documents covered by the deliberative process privilege, [however], must be segregated and disclosed unless they are so interwoven with the deliberative material" that they are not segregable. *See Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir 2008) (citations and quotations omitted). Accordingly, to the extent that media articles or other non-privileged factual materials were considered, they should have been included in the administrative record, and shall be filed as part of the amended administrative record, even if passages are redacted as deliberative, and called out as such in the privilege log.

Here, plaintiffs have rebutted the presumption of completeness. It is evident that Acting Secretary Duke considered information directly, or indirectly, through the advice of other agencies and others within her own agency. These documents, as set forth in detail below, should be made part of the administrative record and must be produced by defendants in an amended administrative record by **NOON ON OCTOBER 27.**

3. **WAIVER OF ATTORNEY-CLIENT PRIVILEGE.**

Plaintiffs next argue that defendants have waived attorney-client privilege because they have put their attorneys' legal opinions at issue by arguing that the rescission was required due to concerns over DACA's legality (Br. at 15-16). Indeed, one of DHS's primary rationales for rescinding DACA was its purported illegality (*see* Dkt. No. 64-1 at 253-56 (Rescission Memorandum)).

Parties are not permitted to advance conclusions that favor their position in litigation, and at the same time shield the information that led to those conclusions from discovery. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). Put differently, "[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield." *Ibid.* Where a party raises a claim, which in fairness to its adversary requires it to reveal the information or communication that claim is predicated upon, it has implicitly waived any privilege over that communication.

Here, defendants argue that DHS had to rescind DACA because it exceeded the lawful authority of the agency. They cannot, therefore, simultaneously re-

fuse to disclose the legal research that led to that conclusion. Defendants indeed, have included the September 4 legal opinion of the Attorney General, pithy as it may be—yet they seek to conceal all other legal analysis available to the Acting Secretary and to the Attorney General.

Significantly, defendants slide into a backup argument that the agency's legal worry was "reasonable" even if wrong. If this backup argument comes into play (as government counsel posits) then the "reasonableness" of taking an incorrect legal position would heavily turn on the underlying legal analysis so far withheld from view. In other words, assessing the reasonableness of the Secretary's legal rationale would turn, in part, on how consistent the analysis has been in the runup to the rescission.

Defendants' arguments to the contrary are unavailing. They first argue, without citation to any legal authority, that "[w]ere plaintiffs' argument accepted, the government would be deemed to have waived all privileges any time an assessment of the legal landscape informed an agency's decisionsmaking" (Opp. at 21). This argument vastly exaggerates plaintiffs' position, and misrepresents the position defendants have staked out in this litigation. DHS specifically relied upon DOJ's assessment that DACA "was effectuated . . . without proper statutory authority," "was an unconstitutional exercise of authority by the Executive Branch" and "has the same legal and constitutional defects that courts recognized as to DAPA" (Dkt. No. 64-1 at 254). Plaintiffs are entitled to challenge whether this was a reasonable legal position and thus a reasonable basis for rescission. In making that challenge, plaintiffs are

entitled to review the internal analyses that led up to this change in position.

Defendants further argue that the decisions cited by plaintiffs are inapplicable because they arose in different contexts than the present action. True, the decisions plaintiffs cite did not arise in identical circumstances. *E.g. Chevron Corp.*, 974 F.2d at 1162 (defendant prohibited from relying on legal opinion that tax position was reasonable while refusing to disclose the attorney communications leading to that conclusion). They still, however, stand for the widely-accepted proposition that it is unfair for a litigant to defend his action with a selective disclosure of evidence. This principle carries no less force here.

In the related context of FOIA, the Court of Appeals for the Second Circuit held that "the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into an agency's policy." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360 (2d Cir. 2005). There, DOJ invoked the reasoning of an OLC memorandum to justify its new position on an immigration issue. *Id.* at 357. The court held that the agency's "view that it may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA." *Id.* at 360. So too here.

Defendants have waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded.

4. DELIBERATIVE-PROCESS PRIVILEGE BALANCING.

Defendants further assert the deliberative-process privilege over many documents.

The deliberative-process privilege, however, is qualified and will yield when the need for materials and accurate fact-finding "override the government's interest in non-disclosure." *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). "Among factors to be considered in making this determination are: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Ibid.*

As set forth below, the judge has personally reviewed *in camera* all materials on the privilege log and applied the foregoing test to each document for which the deliberative-process privilege is claimed.[7]

5. PRIVILEGE LOG REQUIREMENT.

While defendants did not file a privilege log with their original production, they have since, pursuant to order, filed a privilege log claiming attorney-client or deliberative-process privilege over 84 documents considered by Secretary Duke but not included in the administrative record (Dkt. Nos. 67; 71-2). Nevertheless, defendants argue that privilege logs are not generally

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[7] Although not addressed in the brief or at oral argument, the privilege log referenced personal privacy and executive privilege objections for certain documents. No substantial privacy interest is implicated in any of the documents ordered to be produced below, nor do any of these documents fall within the executive privilege.

required in connection with an administrative record and that one should not be required here.

Our court of appeals has not spoken on the issue. Every court in this district considering the issue, however, has required administrative agencies to provide a privilege log. *See, e.g., Ctr. for Food Safety v. Vilsack*, No. 15CV01590HSGKAW, 2017 WL 1709318, at *5 (N.D. Cal. May 3, 2017) (Magistrate Judge Kandis Westmore) ("[C]ourts in this district have required parties withholding documents on the basis of the deliberative process privilege to, at a minimum, substantiate those claims in a privilege log."); *Inst. for Fisheries Res. v. Burwell*, No. 16-CV-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) (Judge Vince Chhabria); *Lockyer*, 2006 WL 708914, at *4.

"If a privilege applies, the proper strategy isn't pretending the protected material wasn't considered, but withholding or redacting the protected material and then logging the privilege." *Inst. for Fisheries Res.*, 2017 WL 89002 at *1.[8]

Courts outside this district that have determined no privilege log was required have done so on the grounds that the defendants' judgment of what constitutes the administrative record is entitled to a presumption of correctness. *See San Luis & Delta-Mendota Water Auth.*

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[8] In a memorandum opinion, our court of appeals denied a plaintiff's request to require a privilege log. *See Cook Inletkeeper v. EPA*, 400 F. App'x 239, 240 (2010). In that decision, however, our court of appeals first denied a motion to supplement the record, and finding that the plaintiffs had not presented evidence that the agency had considered the documents the plaintiffs sought to compel, only then denied the accompanying motion for preparation of a privilege log without further explanation.

v. Jewell, No. 115CV01290LJOGSA, 2016 WL 3543203, at *19 (E.D. Cal. June 23, 2016) (Judge Lawrence O'Neill); *Nat'l Ass'n of Chain Drug Stores v. United States Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009). Here, however, that presumption has been overcome by plaintiffs' showing that defendants failed to include documents considered in arriving at the final decision to rescind DACA in the administrative record. Therefore, even applying those courts' logic, a privilege log would still be appropriate here.

Going forward, defendants shall comply with the standing order in this case and provide a privilege log for all documents withheld on grounds of privilege, which log shall include all authors and recipients of privileged documents, as well as other information set forth in the rule (*see* Dkt. No. 23 ¶ 18).

RELIEF ORDERED

Plaintiffs' motion to complete the administrative record is **GRANTED** to the extent now stated. Defendants are directed to complete the administrative record by adding to it all emails, letters, memoranda, notes, media items, opinions and other materials directly or indirectly considered in the final agency decision to rescind DACA, to the following extent: (1) all materials actually seen or considered, however briefly, by Acting Secretary Duke in connection with the potential or actual decision to rescind DACA (except as stated in the next paragraph below), (2) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with written advice or input regarding the actual or potential rescission of DACA, (3) all DACA-related

materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with verbal input regarding the actual or potential rescission of DACA, (4) all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of DACA and their responses, and (5) all materials directly or indirectly considered by former Secretary of DHS John Kelly leading to his February 2017 memorandum not to rescind DACA.

The undersigned judge has balanced the deliberative-process privilege factors and determined *in camera* that the following materials from the government's *in camera* submission, listed by tab number, shall be included in the administrative record: 1-6, 7 (only the header and material on pages 3-4 concerning DACA), 12, 14, 17-25, 27-30, 36, 39, 44, 47, 49 (only the first paragraph, and the paragraph captioned "General"), 69-70, 73-74, 77, 79, 81, 84. The remainder of the *in camera* submission need not be included.

If the government redacts or withholds any material based on deliberative-process, or any other privilege in its next filing, it shall simultaneously lodge full copies of all such materials, indicating by highlighting (or otherwise) the redactions and withholdings together with a log justification for each. The judge will review and rule on each item.

Plaintiffs' insistence that defendants scour the Department of Justice and the White House for documents for inclusion in the administrative record is overruled except to the limited extent that DOJ or White House personnel fall within the category described in the first paragraph above as someone who

gave verbal or written input to the Acting Secretary. Nor do defendants have to search for DACA materials below the agency levels indicated in the first paragraph above. These are intended as practical limits on what would otherwise be a bone-crushing expedition to locate needles in haystacks.

This order, however, is not intended to limit the scope of discovery (as opposed to the scope of the administrative record). The scope of discovery over and above the administrative record continues to be managed by Magistrate Judge Sallie Kim.

The federal defendants shall file an amended administrative record in conformity with this order by **NOON ON OCTOBER 27.**

If any party plans to seek a writ of mandate and wants a stay pending appellate review, then a fresh motion to that effect must be made very promptly.

IT IS SO ORDERED.

Dated: Oct. 17, 2017.

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Nos. C 17-05211 WHA, C 17-05235 WHA, C 17-05329 WHA, C 17-05380 WHA, C 17-05813 WHA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND ELAINE DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, DEFENDANTS

[Nov. 20, 2017]

ONE-MONTH CONTINUANCE OF DUE DATE FOR AUGMENTED ADMINSTRATIVE RECORD AND TEMPORARY STAY OF DISCOVERY

After consideration of all briefing, the Court stands by its tentative order.

The previous schedule is hereby modified to allow the government an additional month to compile and to file the augmented administrative record, which due date will now be **DECEMBER 22, 2017, AT NOON.** Although the government need not file until that date, it must promptly locate and compile the additional mate-

rials and be ready to file the fully augmented record by December 22, this caution being necessary in order to have a realistic opportunity to reach a final decision on the merits before the March 5 termination date. Additionally, all discovery is hereby **STAYED** until **DECEMBER 22, 2017, AT NOON.**

Meanwhile, we will proceed with the motion to dismiss and competing motion for provisional relief as scheduled. If the motion to dismiss is denied, then we will promptly set a practical schedule to reach the merits with the benefit of the augmented record.

Except to the foregoing extent, both emergency motions for stay are **DENIED.**

IT IS SO ORDERED.

Dated: Nov. 20, 2017.

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX E

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 15, 2012

MEMORANDUM FOR:

David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
/s/ JANET NAPOLITANO
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and

know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they

designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are <u>in</u> removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

/s/ JANET NAPOLITANO
JANET NAPOLITANO

APPENDIX F

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

Nov. 20, 2014

MEMORANDUM FOR:

León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

FROM: Jeh Charles Johnson
/s/ JEH CHARLES JOHNSON
Secretary

SUBJECT: **Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents**

This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.* The following supplements and amends that guidance.

The Department of Homeland Security (DHS) and its immigration components are responsible for enforcing the Nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. Secretary Napolitano noted two years ago, when she issued her prosecutorial discretion guidance regarding children, that "[o]ur Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case."

Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.[1] A form of administrative relief similar to deferred action, known then as "indefinite voluntary departure," was originally authorized by the Reagan and Bush Administrations to defer the deportations of an estimated

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[1] Deferred action, in one form or another, dates back to at least the 1960s. "Deferred action" per se dates back at least as far as 1975. *See,* Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

1.5 million undocumented spouses and minor children who did not qualify for legalization under the *Immigration Reform and Control Act* of 1986. Known as the "Family Fairness" program, the policy was specifically implemented to promote the humane enforcement of the law and ensure family unity.

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States. Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.[2]

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[2] INA § 204(a)(1)(D)(i)(II), (IV) *(Violence Against Women Act (VAWA) self-petitioners not in removal proceedings are "eligible for deferred action and employment authorization")*; INA § 237(d)(2) *(DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request "shall not preclude the alien from applying for . . . deferred action")*; REAL ID Act of 2005 § 202(c)(2)(B)(viii), Pub. L. 109-13 *(requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status")*; National Defense Authorization Act for Fiscal Year 2004 § 1703(c)(d) Pub. L. 108-136 *(spouse, parent or child of certain US. citizen who died as a result of honorable service may self-petition for*

Historically, deferred action has been used on behalf of particular individuals, and on a case-by-case basis, for classes of unlawfully present individuals, such as the spouses and minor children of certain legalized immigrants, widows of U.S. citizens, or victims of trafficking and domestic violence.[3] Most recently, beginning in 2012, Secretary Napolitano issued guidance for case-by-case deferred action with respect to those who came to the United States as children, commonly referred to as "DACA."

By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

The reality is that most individuals in the categories set forth below are hard-working people who have become integrated members of American society. Pro-

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permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").

[3] In August 2001, the former-Immigration and Naturalization Service issued guidance providing deferred action to individuals who were eligible for the recently created U and T visas. Two years later, USCIS issued subsequent guidance, instructing its officers to use existing mechanisms like deferred action for certain U visa applicants facing potential removal. More recently, in June 2009, USCIS issued a memorandum providing deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status.

vided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted.

A. Expanding DACA

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012 provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June

2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (*i.e.*, those who were born before June 15, 1981). That restriction will no longer apply.

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

USCIS should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement.

B. Expanding Deferred Action

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics for USCIS to conduct background checks similar to the background check that is required for DACA applicants. Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of the Immigration and Nationality Act.[4] Deferred action granted

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[4] INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the em-

pursuant to the program shall be for a period of three years. Applicants will pay the work authorization and biometrics fees, which currently amount to $465. There will be no fee waivers and, like DACA, very limited fee exemptions.

USCIS should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement. As with DACA, the above criteria are to be considered for all individuals encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or USCIS, whether or not the individual is already in removal proceedings or subject to a final order of removal. Specifically:

- ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria and may thus be eligible for deferred action to prevent the further expenditure of enforcement resources with regard to these individuals.
- ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for case-by-case determinations. ICE should also establish a process

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ployment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the [Secretary]."); 8 C.F.R. § 274a.12 (regulations establishing classes of aliens eligible for work authorization).

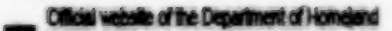
to allow individuals in removal proceedings to identify themselves as candidates for deferred action.

- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear. The USCIS process shall also be available to individuals subject to final orders of removal who otherwise meet the above criteria.

Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority.

APPENDIX G



Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA)

Release Date: Sept. 5, 2017

MEMORANDUM FOR:

James W. McCament
Acting Director
U.S. Citizenship and Immigration Services

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

Kevin K. McAleenan
Acting Commissioner
U.S. Customs and Border Protection

Joseph B. Maher
Acting General Counsel

Ambassador James D. Nealon
Assistant Secretary, International Engagement

Julie M. Kirchner
Citizenship and Immigration Services Ombudsman

FROM:

Elaine C. Duke
Acting Secretary

SUBJECT:

Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"

This memorandum rescinds the June 15, 2012 memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," which established the program known as Deferred Action for Childhood Arrivals ("DACA"). For the reasons and in the manner outlined below, Department of Homeland Security personnel shall take all appropriate actions to execute a wind-down of the program, consistent with the parameters established in this memorandum.

Background

The Department of Homeland Security established DACA through the issuance of a memorandum on June 15, 2012. The program purported to use deferred action—an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis—to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law.[1] Specifi-

[1] Significantly, while the DACA denial notice indicates the decision to deny is made in the unreviewable discretion of USCIS, USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria

cally, DACA provided certain illegal aliens who entered the United States before the age of sixteen a period of deferred action and eligibility to request employment authorization.

On November 20, 2014, the Department issued a new memorandum, expanding the parameters of DACA and creating a new policy called Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). Among other things—such as the expansion of the coverage criteria under the 2012 DACA policy to encompass aliens with a wider range of ages and arrival dates, and lengthening the period of deferred action and work authorization from two years to three—the November 20, 2014 memorandum directed USCIS "to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," to certain aliens who have "a son or daughter who is a U.S. citizen or lawful permanent resident."

Prior to the implementation of DAPA, twenty-six states—led by Texas—challenged the policies announced in the November 20, 2014 memorandum in the U.S. District Court for the Southern District of Texas. In an order issued on February 16, 2015, the district court preliminarily enjoined the policies nationwide.[2] The district court held that the plaintiff states were likely to succeed on their claim that the DAPA program did not comply with relevant authorities.

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as outlined in the June 15, 2012 memorandum, but still had his or her application denied based solely upon discretion.

[2] *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

The United States Court of Appeals for the Fifth Circuit affirmed, holding that Texas and the other states had demonstrated a substantial likelihood of success on the merits and satisfied the other requirements for a preliminary injunction.[3] The Fifth Circuit concluded that the Department's DAPA policy conflicted with the discretion authorized by Congress. In considering the DAPA program, the court noted that the Immigration and Nationality Act "flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization." According to the court, "DAPA is foreclosed by Congress's careful plan; the program is 'manifestly contrary to the statute' and therefore was properly enjoined."

Although the original DACA policy was not challenged in the lawsuit, both the district and appellate court decisions relied on factual findings about the implementation of the 2012 DACA memorandum. The Fifth Circuit agreed with the lower court that DACA decisions were not truly discretionary,[4] and that DAPA and expanded DACA would be substantially similar in execution. Both the district court and the Fifth Circuit concluded that implementation of the program did not comply with the Administrative Procedure Act because the Department did not implement it through notice-and-comment rulemaking.

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[3] *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

[4] *Id.*

The Supreme Court affirmed the Fifth Circuit's ruling by equally divided vote (4-4).[5] The evenly divided ruling resulted in the Fifth Circuit order being affirmed. The preliminary injunction therefore remains in place today. In October 2016, the Supreme Court denied a request from DHS to rehear the case upon the appointment of a new Justice. After the 2016 election, both parties agreed to a stay in litigation to allow the new administration to review these issues.

On January 25, 2017, President Trump issued Executive Order No. 13,768, "Enhancing Public Safety in the Interior of the United States." In that Order, the President directed federal agencies to "[e]nsure the faithful execution of the immigration laws . . . against all removable aliens," and established new immigration enforcement priorities. On February 20, 2017, then Secretary of Homeland Security John F. Kelly issued an implementing memorandum, stating "the Department no longer will exempt classes or categories of removable aliens from potential enforcement," except as provided in the Department's June 15, 2012 memorandum establishing DACA,[6] and the November 20, 2014 memorandum establishing DAPA and expanding DACA.[7]

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[5] *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

[6] Memorandum from Janet Napolitano, Secretary, DHS to David Aguilar, Acting Comm'r, CBP, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012).

[7] Memorandum from Jeh Johnson, Secretary, DHS, to Leon Rodriguez, Dir., USCIS, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as

On June 15, 2017, after consulting with the Attorney General, and considering the likelihood of success on the merits of the ongoing litigation, then Secretary John F. Kelly issued a memorandum rescinding DAPA and the expansion of DACA—but temporarily left in place the June 15, 2012 memorandum that initially created the DACA program.

Then, on June 29, 2017, Texas, along with several other states, sent a letter to Attorney General Sessions asserting that the original 2012 DACA memorandum is unlawful for the same reasons stated in the Fifth Circuit and district court opinions regarding DAPA and expanded DACA. The letter notes that if DHS does not rescind the DACA memo by September 5, 2017, the States will seek to amend the DAPA lawsuit to include a challenge to DACA.

The Attorney General sent a letter to the Department on September 4, 2017, articulating his legal determination that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." The letter further stated that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." Nevertheless,

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Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents" (Nov. 20, 2014).

in light of the administrative complexities associated with ending the program, he recommended that the Department wind it down in an efficient and orderly fashion, and his office has reviewed the terms on which our Department will do so.

Rescission of the June 15, 2012 DACA Memorandum

Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

Recognizing the complexities associated with winding down the program, the Department will provide a limited window in which it will adjudicate certain requests for DACA and associated applications meeting certain parameters specified below. Accordingly, effective immediately, the Department:

- Will adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted by the Department as of the date of this memorandum.

- Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum.

- Will adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for Employment

Authorization Documents from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017.

- Will reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified above.

- Will not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum for the remaining duration of their validity periods.

- Will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole. Notwithstanding the continued validity of advance parole approvals previously granted, CBP will—of course—retain the authority it has always had and exercised in determining the admissibility of any person presenting at the border and the eligibility of such persons for parole. Further, USCIS will—of course—retain the authority to revoke or terminate an advance parole document at any time.

- Will administratively close all pending Form I-131 applications for advance parole filed under

standards associated with the DACA program, and will refund all associated fees.

- Will continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.

This document is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

APPENDIX H

1. 5 U.S.C. 701 provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

2. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus pro-

vision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of

constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every

provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative find-

ings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

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[1] See References in Text note below.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas

corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with ap-

plicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of

this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.